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Filed - 11/11/94

Abstract

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PUBLISHED IN ABSTRACT

Peter J. Geerlings, Appellee, v. Acme Feeds, Incorporated, Appellant.

Gen. No. 9246

310 I.A. 2581

MR. PRESIDING JUSTICE FULTON delivered the opinion of the court.

The appellee, Peter J. Geerlings, brought suit in the circuit court of Sangamon County for an accounting for commissions and earnings alleged to be due him from the appellant company, Acme Feeds, Incorporated.

The complaint consisting of two counts set forth the contracts of employment between the parties, the performance of services and the claim for a large amount of commissions due and owing to the appellee.

An answer was filed by the appellant denying that it owed the plaintiff any money and also a counterclaim wherein it was alleged and claimed that the appellee was indebted to the appellant for charge backs on account of false credit reports set to the appellant company by appellee, in order to obtain sales of feed to customers on time, and also for money owed by the appellee to appellant.

The case was referred to a master in chancery who took voluminous proofs, both oral and documentary. The master made a long and detailed report back to the court in which he found the issues for the appellee and recommended that a decree be entered in his favor for the sum of \$1585.95. Objections to the report were filed by both parties and heard as exceptions in the circuit court. The court overruled the exceptions filed by appellant, sustained two exceptions filed by appellee, and entered a money decree in favor of the appellee for the sum of \$1,792.74, and costs of suit. It is of this decree that appellant complains and brings an appeal to this court.

The appellant assigns two items as error upon which it relies for reversal.

1. The court erred in refusing to allow appellant's exceptions with reference to the "John Farnbaugh account."

2. The court erred in allowing appellee's exceptions as to the accounts of "William Flynn" and "Alfred D. McCoy."

The facts which disclose the relationship of the parties are as follows: The appellee commenced working for the Aeme Manufacturing Company, a partnership, which was afterwards merged into the appellant corporation, about May 1935. A written contract was entered into whereby appellee was employed as a salesman covering territory in South Central Illinois, and providing for definite commissions on all products sold for appellant company. He worked under that contract until September 10, 1936, at which time he was employed by appellant as sales manager under an oral contract. He acted in that capacity until February 9, 1937. On that date he entered into another written contract to work for the appellant as a salesman and remained so employed until June 7, 1937. The contract dated February 9, 1937, was somewhat similar in terms and as to the rate of commissions to be paid, as the contract of May 20, 1935. Each of said contracts contained the following clause: "It is distinctly understood that your authority is limited to taking orders subject to our acceptance. No agency powers are given or implied."

The officers of appellant testified that there was a subsequent oral agreement between the parties wherein it was agreed that appellee would be responsible to the appellant company for all losses incurred by the company by reason of false credit reports and the same would be charged back against the appellee's account. The appellee denies that he ever entered into any such oral contract.

The chief controversy in the case arises over the so-called "John Farnbaugh" account for the sum of \$955.95. The order for this sale was procured by a local dealer, E. H. Guthrie, of Whitehall, Illinois, and turned over to appellee, who made out the order and the credit information blank. In the credit report it was stated that John Farnbaugh had no unpaid chattel mortgages or liens unpaid on record.

The sale was made August 21, 1936, when appellee was working under the first written contract. It later developed that on said date the hogs belonging to Farnbaugh were covered by a chattel mortgage. Appellee testified that the information on the credit report was given him by the local dealer, E. H. Guthrie. His testimony is corroborated by the evidence of Guthrie. The record shows other inaccuracies or misstatements concerning inspection and investigation. The order was accepted by the company and the goods

shipped to Farnbaugh who has never paid the bill. Even if there were no oral contract making appellee responsible for losses on account of false credit information, we believe he could have been held liable under such circumstances. It appears, however, that shortly before the institution of this suit the parties met for the purpose of adjusting their accounts and at that meeting appellee offered to have the John Farnbaugh account assigned to him and charged against the amount that was due him for commissions. This offer was refused with the statement from appellant that they would take their chances on the collection of said account. It is our judgment that there being no specific guaranty of collection by appellee, and appellant electing to rely upon its contract with Farnbaugh waived its right to hold appellee responsible for the payment of the account. In furtherance of such election, the appellant later brought suit against Farnbaugh in the circuit court of Greene County, Illinois, and obtained a judgment for the sum of \$1,080.35. No error was committed by the court in finding for appellee upon the Farnbaugh account.

As to the Alfred D. McCoy account in the sum of \$79.54. This order was taken by appellee from a high school boy aged 15 years. The credit information sent into the company did not disclose the fact that the purchaser was a minor. The bill of sale and conditional sales contract was signed in blank by the minor and afterwards filled in by appellee showing that the boy had 19 pigs and 2 brood sows, whereas he had only 10 pigs. The credit report mailed to the company by appellee represented that the purchaser owned a large quantity of corn and oats, whereas he really had none of his own. The goods were shipped but never paid for resulting in a loss of the company of \$79.54.

We believe appellee should be held responsible for this loss because of false credit information furnished and that the court should have overruled appellee's exception as to this item and allowed the the amount as a set-off against the credits due to appellee.

Concerning the William Flynn account of \$79.93 for merchandise shipped to the purchaser at Raymond, Illinois, the testimony shows that the order was filled and the bill never paid. On the back of the contract appears the written guarantee of payment signed by appellee. It is contended by counsel for appellee that no mention was made of this account in the amended counter-claim filed by the appellant. A search of the

record indicates that in no part of the pleadings filed by appellant was there any mention of this account and although there was ample opportunity between the time objection was made and the entry of the decree no effort was made by appellant to make such amendment to conform to the proof. Therefore, the court very properly allowed the exception of appellee to the allowance of said item by the master.

The appellee has assigned cross-errors because of the refusal of the court to allow exceptions to the master's report concerning four items designated as follows:

- (a) Ernest Peabody account\$193.00
- (b) Clarence Kime account 60.00
- (c) Commission charge backs 151.75
- (d) George H. Simpson account 300.00

The appellant was allowed a set-off on the Peabody account by the master because of false credit information similar to that permitted on the McCoy account discussed herein and exception to that ruling was properly overruled by the court.

The appellee collected \$60.00 in settlement of the Clarence Kime account which was never turned over to appellant and exception to the allowance of same as a set-off by the master was correctly overruled. The same ruling with reference to the item of charge backs of \$151.75, is also upheld by this court.

On the George H. Simpson account of \$300.00, for moneys advanced to appellee there is a direct conflict in the testimony. On the hearing before the master he had the opportunity of seeing the witnesses and observing their demeanor while testifying, and while his finding does not carry the same weight as the verdict of a jury, nor a chancellor, where the witnesses have testified before him, yet the master's findings are entitled to due weight on review of the cause. In this case after the master's report had been submitted to the court, the appellee was permitted to testify for the purpose of correcting a date, and also to deny the payment to him of the sum of \$300.00. After this additional testimony the chancellor approved the conclusions of the master. In that situation the reviewing court is not justified in disturbing the findings unless they are manifestly against the weight of the evidence. *Wagner v. Maguire*, 297 Ill. App. 48. *Pasedach v. Auw*, 364 Ill. 491.

We can find no error by the court in refusing to allow appellee's exception to the master's ruling on this item.

This case was considered by the ~~Master~~ in ~~Chancery~~ in a long extended trial and reviewed by an experienced and learned trial ~~Court~~, and we believe that substantial justice has been done, except as to the one item of \$79.54, on the Alfred D. McCoy account, which should have been allowed to ~~Appellant~~ as a set-off against the amount due to the Appellee. In all other respects the decree of the trial court is affirmed. The case will be remanded to the Circuit Court of Sangamon County with instructions to modify and amend the decree as to the McCoy item, so that it will show a judgment in favor of the Appellee and against the Appellant for the sum of \$1,713.20 and four-fifths of all the costs of this proceeding and that the Appellee be required to pay the remaining one-fifth of said costs in this Court.

JUDGMENT OF CIRCUIT COURT AFFIRMED
IN PART AND REVERSED IN PART AND
REMANDED WITH INSTRUCTIONS AS TO
ENTRY OF MODIFIED DECREE.

This case was considered by the court in 1904 in a long extended trial and was decided in favor of the defendant. The court was divided 5-4. The majority opinion was written by Justice Brandeis and was a landmark decision. It held that the defendant was not guilty of the crime charged. The court also held that the defendant was entitled to a fair trial and that the government had not met its burden of proof. The decision was a major victory for the defense and was a landmark case in the history of the Supreme Court. It established the principle that the government must prove its case beyond a reasonable doubt. This case was a major victory for the defense and was a landmark case in the history of the Supreme Court. It established the principle that the government must prove its case beyond a reasonable doubt.

PUBLISHED IN ABSTRACT

Abstract

**Eleanor Babb and Blanche B. Dennison, Plaintiffs-
and Appellees, v. Hazel L. Babb,
Defendant and Appellant.**

Gen. No. 9260.

310 I.A. 258²

MR. PRESIDING JUSTICE FULTON delivered the opinion of the court.

This appeal is taken from two separate and independent orders or judgments entered in a partition suit by the circuit court of Pike County, Illinois.

The first order complained of was the action of the court in overruling appellant's objections to a sale of lands by the master in chancery, and the approval of the master's report of sale on November 17, 1939. The notice of appeal from this order was filed May 3, 1940. On motion to dismiss the appeal from such order on the ground that more than ninety days had elapsed after the entry of the order appealed from and the date the appeal was perfected without any leave being granted, this court by previous order dismissed that part of the appeal. See Sec. 76, Chapter 110, Ill. Rev. Stats., State Bar Edition.

No further attention or consideration is therefore given to the appeal from such order in this opinion.

Appeal was also taken from an order of the same court entered on April 26, 1940, denying the motion of appellant to vacate a prior order of the court dated April 13, 1940, which ordered appellant to grant appellees immediate possession of the premises in controversy. The order of April 26, also provided for a writ of assistance to put appellees in possession of said premises.

The original decree of partition fixing the rights of the parties found that the premises in controversy consisted of 100 acres of farm land; that the two appellees and the appellant each owned an undivided one-third interest in said farm and that the appellant was in possession of said land as a tenant under a lease that expired on March 1, 1940. A decree of sale was later entered and sale held by the master in chancery on September 29, 1939, at which sale the appellees were declared to be the purchasers. The sale notice stated that the lands were sold subject to the rights of the

tenant, Hazel L. Babb (appellant) whose tenancy expires March 1, 1940. After the approval of the report of sale, the master executed and delivered a deed to the appellees. Possession was not surrendered by appellant on March 1, 1940, and on April 8, 1940, the appellees filed a petition in the cause asking for an order upon the appellant to surrender possession and for a writ of assistance. The petition was heard by the court on April 13, 1940, and an order entered on that date requiring appellant to surrender possession, and upon her failure to do so within ten days writ of assistance to issue. Appellant filed a motion to vacate this order, and on April 26, 1940, a hearing was held on the motion. On the same date a stipulation was entered into by the parties showing that at the hearing upon said motion certain facts were produced and considered by the court. In addition to the facts hereinabove stated, the stipulation showed the following further facts: that the appellant was a defendant in the partition proceedings and a bidder at the sale; that she was in possession of the premises on the date of sale, September 29, 1939, and until the hearing on April 26, 1940; that a copy of the order, dated April 13, 1940, was personally served upon said appellant, but that no other demand had been personally made upon her for possession prior to March 1, 1940; that the appellees had leased the farm to another tenant in the early part of April, 1940, who did farm work on the premises for about ten days. The stipulation also contained a letter written by one of the appellees, Eleanor Babb, dated January 11, 1940, directed to the appellant, Hazel L. Babb, inquiring as to whether or not she would be interested in renting the farm for the coming year, and requesting a prompt reply. The answer to this letter, dated January 26, 1940, was set forth in the stipulation, signed by appellant, in which she said nothing about leasing but threatened further litigation unless her one-third share was deeded back to her. There was no further conversation or correspondence between the parties and it was agreed that appellees had not been in Pike County since sometime prior to January 1, 1940.

The court denied the motion to vacate its prior order and held the same to be in full force and effect. A further order was entered directing the clerk to issue a writ of assistance to the sheriff of said county commanding him to put the appellees in possession of the real estate described in the decree of partition.

It is from this order that the appellant appeals contending that as tenant she had been permitted to hold over the said premises from the 1st day of March, until the 13th day of April, 1940, and that thereupon a tenancy from error had been claimed and that appellees were estopped from denying her rights as tenant for the year subsequent to March 1, 1940.

We can find no support for this position taken by appellant either in the facts or in the authorities contained in her brief. The appellant was a party to the partition suit. The decree found that she was a tenant of the premises and in possession under a lease expiring March 1, 1940. The sale notice stated that the premises would be sold subject to her rights as tenant expiring on said date. She was a bidder at the sale. There is no evidence that the appellees committed any act before or after the termination of the lease indicating that appellees intended to lease the farm to appellant. In this situation and under the circumstances shown by this record we believe our courts have held that when a tenant holds over after his term has expired, the landlord, at his election, may treat him as tenant for a new term, or a trespasser. *Condon v. Brockway*, et al 157 Ill. 90. *Cottrell v. Gerson*, 296 Ill. App. 412.

There is no evidence on the part of appellees in this case showing an election to treat appellant as a tenant for a new term, but on the contrary the testimony shows her to have been treated as a trespasser after March 1, 1940.

The action of the circuit court in denying the motion of the appellants and in entering an order upon her to surrender possession of the premises to appellees is approved and the judgment of that court affirmed.

Affirmed.

Index April 1941
Abstract

PUBLISHED IN ABSTRACT

**L. Martin, Plaintiff Appellee, v. Estate of Ida Illinois
Martin, Deceased, by Daisy Martin Spilman, One of
the Administratrices of the Estate of Ida Illinois
Martin, Deceased, Defendant Appellant,
and Myrtle E. Martin and Nellie O.
Smith, Co-Administratrices of
the Estate of Ida Illinois
Martin, Deceased, De-
fendants Appel-
lees.**

310 I.A. 259'

Gen. No. 9279

MR. JUSTICE RIESS delivered the opinion of the court. Defendant Daisy Martin Spilman, an administratrix of the estate of Ida Illinois Martin, deceased, has appealed from a judgment in the sum of \$934 entered in the Circuit Court of Montgomery County on September 30, 1940, in favor of plaintiff appellee, L. Martin, payable from said estate in due course of administration. Plaintiff appellee has filed a cross appeal from an order of court granting defendant's motion for a directed verdict disallowing certain claims of plaintiff against said estate in the respective sums of \$2700 and \$700 on the ground that the latter were barred by the statute of limitations.

The claims were originally filed in the county court of said county, and upon trial thereof, were disallowed by the court, from which an appeal was taken to the circuit court, wherein the claims were heard de novo with the above results. At the close of plaintiff's evidence, defendant moved for a directed verdict in its favor on all claims, which motion was allowed as to two of the claims and denied as to the third and a motion of defendant for judgment non obstante verdicto was also denied. Defendant's appeal and plaintiff's cross appeal then followed.

The original claim which was filed on February 18, 1936, consisted of three items comprising cash alleged to have been loaned to the decedent for the building of

a certain dwelling house in the sum of \$2700; toward the building of two smaller houses in the sum of \$700 and of cash advanced by numerous checks attached to the original claim which were offered and admitted in evidence aggregating \$934.

It appears from the evidence that subsequent to the death of Ida Illinois Martin, intestate, on February 5, 1935, her three daughters, Daisy Martin Spilman, Nellie O. Smith and Myrtle E. Martin, applied for and were granted joint letters of administration by the county court of said county on February 20, 1935; that on March 13, an inventory was filed and approved and that on February 18, 1936, the above claim was duly filed against the estate by L. Martin. In addition to said daughters, the decedent left surviving LaRue Martin, a son, the claimant herein.

Myrtle E. Martin, one of the administratrices, testified in substance that her mother, with whom she was living at the time of death, had at and prior to the time of such death resided at 943 Jefferson Street in Hillsboro, Illinois; that the house was built there in 1905, at which time the entire family consisting of the above named three daughters, mother and son, LaRue, lived together in the family relation; that the daughter, Myrtle, took care of her mother a great deal of the time during the latter years of her life and transacted her business affairs from and after 1932 until the time of her death in 1935, attending to everything that required attention and handled the money in taking care of her mother's affairs; that she paid bills for her mother such as taxes, insurance, gas, light, telephone, grocery bills and the fuel that was used.

She further testified that her brother, the claimant LaRue Martin, regularly sent money by check subsequent to 1932 which she used for these purposes and that she received nothing for staying with her mother out of these checks; that she ate some of the food furnished at the table with her mother, for whom she was caring at the time; that the checks which were offered and admitted in evidence were in the handwriting of claimant LaRue Martin, who was then and had been for some years prior thereto residing with his own family in Dexter, New Mexico; that the money arising from the checks were used for the mother, which checks were received between June 7, 1932, and December 1, 1934, and so expended in the aggregate sum of \$934.

The checks, comprising plaintiff's exhibits 4 to 31, inclusive, were received on various dates, usually

monthly, and ranged in sums from \$25.00 upwards. They were drawn on the First National Bank of Roswell, New Mexico, payable to the order of Myrtle Martin. A four page letter and envelope dated July 26, 1932, from LaRue Martin to Daisy Martin Spilman was also offered and admitted in evidence as defendant's exhibits 1, 2, 2A, 3 and 3A, insofar as the same related to the mother's affairs.

The witness further stated that these payments followed what she termed an agreement which she and her brother made among themselves that he was to contribute money and she was to use this money for her mother, which statements and alleged oral agreement was made in the presence of her mother in 1932; that from thence until her death, she contributed her services to her mother, living in the house with her and caring for her until the time of her death in 1935 at the age of seventy nine years; that she lived in the same house, used the phone, conducted kindergarten classes during two or three seasons of that time; that her mother was not physically able to use the phone or do her work; that during the last two and one half years of her life, her mother was very feeble and required that she be looked after "like a little child" and could not get along without her help; that the money arising from the kindergarten teaching and certain small rentals accruing from the two small houses were used with the contributions of claimant toward maintaining the mother and was so paid and expended at the home.

The daughter, Nellie O. Smith, testified that she lived at Sorento, Illinois, and that during the last three years of her mother's life she occasionally visited her and the sister Myrtle, who was taking care of the mother; that she saw some of the checks handed to her husband and some were taken to town and cashed by him for the above purpose.

Her husband, A. R. Smith, testified that during the last three years of the mother's illness, some of the checks referred to were received from LaRue Martin and handed to him for cashing at the bank; that he got the cash and took it back to Myrtle Martin; that she was the one who stayed there and took care of the mother during the last few years of her life.

The defendant daughter and co-administratrix, Daisy Martin Spilman, testified that she was the oldest of the children. She identified the envelope and letter to her from her brother dated July 26, 1932, certain

lines of which had been underscored, which underscoring the jury was instructed to disregard.

It further appears from the evidence that the residence in which the deceased resided was built in 1905 at a cost of \$2700 on a lot owned in fee by the mother and that two small houses were so built on a lot of the deceased in 1907 at a cost of \$1100, which moneys were furnished by the claimant LaRue Martin and upon which latter sum of \$1100 he had been repaid in excess of \$300; his claim for the balance being \$700. The daughter, Myrtle Martin, also testified concerning a certain conversation she had with the mother about two years before her death in which the latter made the remark that "I wish I had something to give you. You know I haven't anything. I owe all—I'm indebted to Rne for all these places; I owe him everything." She further testified that in previous years the mother had mentioned what LaRue had done. During the time that the above houses were built, the mother and children all lived in their home at Hillsboro in the family relation. During all the time the checks were written between 1932 and 1935, the claimant son, LaRue Martin, who had married lived with his family in the state of New Mexico.

The motion for a directed verdict in favor of the defendant estate as to the two items of \$2700 and \$700 for moneys alleged to have been advanced by the claimant in 1905 and 1907 toward the construction of the houses was allowed by the Court. We believe from a careful consideration of the whole of the evidence that these claims were barred by the statute of limitations and that there is no evidence or reasonable inferences therefrom appearing to the contrary.

The funds had been advanced more than thirty years before the claim was filed or asserted. No note or evidence of indebtedness was given, nor was proof made of any promise made to repay the same. No evidence of any subsequent promise within the period of the statute of limitations to pay the same appears in the record. The subsequent expression of gratitude by the mother, who lived in the family relation with the son at and subsequently to the time the original moneys were advanced more than thirty years ago did not, as between the parties, constitute either an express or implied promise that the same would be repaid, and the Court, in the absence of any such evidence, where the statute of limitations was interposed and asserted

as a defense, properly granted the motion for a directed verdict as to said claims.

We therefore hold that as to said claims upon which cross appeal was taken by the plaintiff, the court committed no error and the action of said court in granting the motion and entering judgment against the plaintiff on said claims should be affirmed herein.

It further remains to pass upon the appeal of defendant from the action of the court in denying its motion for a directed verdict in favor of the estate as to the third item of plaintiff's claim in the sum of \$934 covering the amount advanced by checks toward the care and support of the deceased between 1932 and the time of her death in 1935; from the further action of the court in denying defendant's motion for judgment in its favor notwithstanding the verdict and for certain alleged prejudicial errors appearing in the instructions.

It appears from the evidence that this money was advanced by the claimant to aid in his mother's support after conversation was had between the claimant, the sister Myrtle and the mother, to be used toward her support and maintenance; that at the time the same were made, the claimant did not maintain a family relation status with the mother but lived with his own family in a distant state; that whether or not the contributions so made by him under the circumstances in evidence were in the nature of a gift or loan became a question of fact for the jury; that there was evidence from which the jury were justified in holding and finding that a contractual obligation arose and existed between the claimant and the deceased in the same manner as if the said transaction had taken place between strangers, and we hold under the state of the record herein that the verdict finding from the exhibits and oral testimony that there remained due and unpaid on the third item of the verified claim of the plaintiff against said estate the sum of \$934 was justified. We hold that the said question of fact was properly submitted to the jury and that their verdict was not contrary to but in accord with the manifest weight of the evidence and that the claim and judgment thereon was properly allowed and entered by the court.

Certain objections to instructions given for the plaintiff and refused on behalf of the defendant by the trial court are also raised in the appellant's brief. Other than the general objection in appellant's motion for a new trial that the court had erred in giving such

instructions, no specific objection was made, and we hold that such specific grounds of objection to the respective instructions herein complained of cannot now be raised in this court for the first time upon appeal and we deem the same to have been waived. *Greer v. Shell Petroleum Corp.*, 281 Ill. App. 238, 245-246.

While all of the assignments of error of the appellant and cross appellant have not been discussed by the court, they have been duly considered, and from the whole of the record we find no reversible error therein.

The judgment of the circuit court of Montgomery County will therefore be affirmed.

Affirmed.

41372

F. E. LASECKI, as Administrator de bonis
non of the Estate of STANLEY BOREX,
deceased,

APPEAL FROM

Appellant,

SUPERIOR COURT

1

BARBARA A. FISCHER and ALFRED FISCHER,)
GOSHAW COUNTY.

Appellees.

810 I.A. 259

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

This is an appeal by the plaintiff from an order entered by the court, after a trial, dismissing the cause for want of equity. The plaintiff's bill in equity was filed May 7, 1932, which sought to impose a trust upon the proceeds of certain insurance policies in the amount of \$8,482 which had been issued on the life of the plaintiff's intestate and which proceeds had been paid by the insurer to the defendant Barbara A. Fischer under a change of beneficiaryship executed by the deceased shortly before his death. The bill also alleged that certain belongings of the deceased had been converted by the defendants and prayed for an accounting, but inasmuch as a finding of fact was made by the trial court in this respect appellant does not urge this latter point.

The case was at issue upon the plaintiff's bill and upon the affidavit of defense filed by the defendant on October 6, 1939, which affidavit of defense was ordered to stand as defendant's answer. Although no point is raised upon the pleadings, it is suggested that the affidavit of defense was filed in support of a motion and petition filed by defendants to vacate a decree on January 18, 1937; that the trial court sustained the vacated the decree and certain preliminary orders. the affidavit of defense stand as the answer of Upon these pleadings the case was tried by the court.

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On August 9, 1928, Stanley Borek died intestate, a resident of Chicago, Illinois, letters testamentary issuing from the Probate Court of Cook County to plaintiff as administrator de bonis non. Prior to his death, Stanley Borek had lived and conducted a steamship ticket and foreign exchange business at 1431 West Chicago Avenue, in Chicago, Illinois. He was a bachelor, was about 45 years of age at his death, was of Polish birth with no close relatives in this State, and conducted most of his business with people of Polish descent. The defendant, Barbara A. Fischer, for some years prior to Stanley Borek's death had been a practicing attorney in Chicago, with her office at 1109 Noble Street in that city, about five or six blocks from the home and place of business of the deceased. It is further alleged in the bill that from 1926 until the decedent's death the relationship of attorney and client existed between him and Mrs. Fisher. This was denied in the affidavit of defense, which, however, admitted that about six months prior to the decedent's death she represented him in a certain automobile accident case in the Municipal Court of Chicago, although the case had never been tried, owing to the intervention of the death of the decedent. At the trial it was admitted that Mrs. Fischer had been attorney of record for the deceased in one case from August 18, 1926, to September 21, 1928; but in Mrs. Fischer's testimony, she denied that she had said in the Probate Court that she had represented the deceased in two cases, or that she had drawn a will for him, but stated that she had then said that she represented him in one automobile accident case. The trial court made a finding that Barbara A. Fischer had acted as attorney for the deceased in three matters - two automobile cases and a will matter.

It appears that on September 13, 1924, the deceased took out a policy of life insurance with the Prudential Insurance Company of America in the sum of \$8,000, payable to Karol Borek, his brother. It further appears from the allegations of the bill that on January 2, 1920, the same insurer issued a policy on the life of the deceased for \$1,000.00 payable to Helena Borek, mother of the deceased.

[illegible]

It appears further that in response to a notice to admit facts, Mrs. Fischer admitted that between August 9, 1928, and February 20, 1929, she had received \$8,362.31 from the Prudential Insurance Company of America as the proceeds of the two policies upon the life of Stanley Borek. The two checks totaling this amount were introduced in evidence as plaintiff's exhibits 1 and 2. It is further admitted by defendant's affidavit of defense that for about 15 weeks the deceased had been seriously ill in St. Mary of Nazareth Hospital and Alexian Brothers Hospital, from which illness he died on August 9, 1928. The changes of beneficiary to the defendant Barbara A. Fischer were made by the deceased on or about July 26, 1928, and were made by the insurer on August 2, 1928.

It appears from the evidence that Sophie Zebroski, a witness for the plaintiff, testified that she had known Mrs. Fischer since August, 1928, when she and her husband had purchased Mr. Borek's business from Mrs. Fischer. At that time, Mrs. Fischer had told the witness that she (Mrs. Fischer) was getting some insurance money and would take care of the debts of the deceased. Subsequently, Mrs. Fischer had told her that she (Mrs. Fischer) need not pay the deceased's creditors if she did not care to do so. Mrs. Fischer in her testimony itemized claims totaling \$1,336.50 that she had paid for Stanley Borek after his death; and further testified that inasmuch as she was the beneficiary of the insurance proceeds, she thought it only proper that she should pay the funeral bills and expenses of the last illness. She denied, however, making the statements attributed to her by Mrs. Zebroski.

It further appears, from the testimony of Walter H. Fischer that he had sold Borek's business to Mr. and Mrs. Zebroski for \$500 after the decedent's death, but said that he had acted on behalf of a man named Mitchell, to whom he had turned over the purchase money.

The defendant calls attention to a lack of identity between the original and present plaintiff. It appears that the bill was filed by the Reliance Bank and Trust Company, as administrator de bonis non. The plaintiff suggests in reply that an order was entered on May 8, 1936, substituting F. E. Lasecki, as Administrator de bonis non, as plaintiff; and that after that time, all pleadings, orders, and files were captioned in the new name, as an examination of the record shows. Plaintiff further suggests that, inasmuch as no point as to the change of plaintiff was made in defendant's affidavit of defense nor at the trial, plaintiff did ^{not} incorporate the order of substitution in the record nor copy the captions of the pleadings into the abstract, other than that of the notice of appeal.

The defendants suggest that the plaintiff has no interest in this controversy and that the proper plaintiffs are the original beneficiaries under the policies. This point was not raised in the affidavit of defense or at the trial, and, therefore, this court will not consider the questions called to our attention on this matter. In the case of Bittner v. Field, 354 Ill. 216, the court there held that "A defense not presented by the answer will not be considered on review". Again, in the case of City of Mattoon v. Noyes, 218 Ill. 594, it was held that "a defense not made in the court below will not be considered in this court when the record is reviewed here". The plaintiff urges in this regard that the original beneficiaries would only be interested in a suit on the policy if the change of beneficiary had been invalid - in which case they would still have their remedy against the insurer on the policy. Plaintiff goes on to point out that the change of beneficiary was validly executed, and to contend that the trust arose only when the defendant received the insurance proceeds; and that since there is no claim by anyone that the execution of the change of beneficiary was invalid, the original beneficiary can have no interest in the suit, and consequently - the insured being now deceased, the plaintiff as his personal representative is the only person who can ask that a trust be enforced

The defendant calls attention to a lack of identity between

the original and present plaintiff. It is true that the bill was filed by the Helinac Bank and Trust Company, an administrator of Benja non. The plaintiff suggests in reply that an order was entered on May 8, 1938, substituting F. J. Leese, Jr. as administrator of Benja non as plaintiff; and that after that time, all assignments, orders, and files were captioned in the new name, as an examination of the record shows. Plaintiff further suggests that, inasmuch as no notice as to the change of plaintiff was made in defendant's affidavit of defense nor at the trial, plaintiff should incorporate the order of substitution in the record not only the existence of the change into the abstract, other than that of the notice of appeal.

The defendant suggests that the plaintiff has no interest in this controversy and that the proper plaintiff was the original beneficiary under the policies. That, if not correct in the affidavit of defense or at the trial, and, therefore, this court will not consider the question called to our attention on this matter. In the case of Alper v. Life, 254 Ill. 112, the court there held that "a defense not presented by the answer will not be considered on review". Again, in the case of Life of Johnson v. Jones, 118 Ill. 394, it was held that "a defense not made in the court below will not be considered in this court when the case is reviewed here". The plaintiff urges in this regard that the original beneficiary would only be interested in a suit on the policy if the change of beneficiary had been invalid - in which case he would still have their remedy against the insurer as in Alper v. Life, 254 Ill. 112, to point out that the change of beneficiary was validly made, and to contend that the trust arose only when the policy was received the insurance proceeds; and in fact since there is no evidence that the execution of the change of beneficiary was invalid, and original beneficiary can have no interest in the proceeds, the insured being now deceased, the plaintiff is his personal representative is the only person who can sue and is entitled

for the benefit of the insured, whether the amount of claims against his estate be \$850.00 or \$10,000.

Upon consideration of the merits, the real issue before us is whether the trial court erred in finding the issues for the defendant Barbara A. Fischer and in dismissing the cause for want of equity. The trial court in passing upon the question stated that:

" * * * There is no evidence here, of course, of any kind by the plaintiff that there was any wrong doing or fraud or duress or anything of the kind practiced by Mrs. Fischer on this man. There was no deathbed force used, or influence or force or persuasion or anything of that kind, although he was in the hospital for some time."

"So far as getting property from him is concerned, she was not in any position of influence over him, as far as I can see from the evidence. * * *

"We have an utter lack of any evidence or attempted evidence that wrong was done in any way. * * * I don't think the evidence shows a fiduciary relationship. And even if it did, the whole case, taking all the evidence, would easily account for his giving his insurance to her if he saw fit."

The court further said, "We do not know exactly what debts there were" and found that there was nothing in the evidence to impress the insurance money with any trust. We have carefully considered the record and we quite agree with the conclusion reached by the trial court that there is no evidence that would indicate that a trust was created at the time of the change of beneficiary to the defendant Barbara A. Fischer. As we have stated plaintiff admits that the transfer of the policies was a valid transfer, and it is further indicated in plaintiff's brief that there was no claim by anyone connected with this law suit that the execution of the change of beneficiary to Barbara A. Fischer was invalid. If that is so, there is only the remaining question as to whether the evidence would justify the trial court in a conclusion that there was an express trust created at the time of the change of the beneficiary or that a constructive trust arose when the defendant received the insurance proceeds. The fact that there was a relationship of attorney and client existing, does not of itself impress the monies received by

for the benefit of the insured, whether in money or kind, and his estate be \$50,000 or \$10,000.

Upon consideration of the matter, the court found that

as is whether the trial court erred in finding the facts for the

defendant Barbara A. Flecher and in deciding the facts for the

of equity. The trial court in its opinion found that the

"There is no evidence that the plaintiff had any interest in the insurance policy or anything of the kind effected by it, either as insured or as beneficiary. There was no deathbed force used, or influence or fraud or concealment or anything of that kind, although he was in the hospital for some time. To have a killing and then to die in a hospital, and was not in any position of influence over him, and I can see from the evidence."

"We have an utter lack of any evidence of attempted evidence that wrong was done in any way. The evidence shows a friendly relationship. The evidence, taken as a whole case, taking all the evidence, would justify a verdict for the giving his insurance to her if he was fit."

The court further said, "I do not know exactly what debt there was."

and found that there was nothing in the evidence to support the

insurance money with any truth, and we have stated that the

record and we quite agree with the opinion rendered by the trial

court that there is no evidence that the plaintiff had a trust

was created at the time of the change of ownership by the plaintiff

Barbara A. Flecher. We have stated that the plaintiff

transfer of the policies was a gift, and that the plaintiff

indicated in the trial court that the plaintiff was

connected with him and that the plaintiff was

beneficiary to Barbara A. Flecher as the plaintiff

is only the remaining issue as to whether the plaintiff

the trial court in a conclusion that the plaintiff

operated at the time of the change of ownership by the plaintiff

constructive trust arose from the fact that the plaintiff

proceeds. The fact that there was no debt

claim existing, does not affect the

Mrs. Fischer with a trust. In passing upon the question as to whether it is wrong for an attorney to deal with his client, the question is as to whether the transaction or contract is open, fair and honest. When deliberately made, such transactions or contracts, if open, fair and honest, are as valid as contracts between other parties. There is no evidence here that Mrs. Fischer tried to influence or persuade the deceased, nor that there was anything done in influencing him to make the change in beneficiary. We believe the evidence is clear that there was no effort made by Mrs. Fischer to exert influence or create the attitude of deceased to make a change in beneficiary under the insurance policies on deceased's life. In the case of Masterson v. Wall, 385 Ill. 102, which we have followed, the court said, " * * * An attorney is not prohibited from dealing with his client or buying his property (citing cases). Such contracts, if open, fair and honest, when deliberately made, are as valid as contracts between other parties * * *."

There appearing to have been no influence, persuasion or force used in the present case, we believe that the facts as they appear in this record justified the trial court in finding the issues for the defendant Barbara A. Fischer and dismissing the cause for want of equity.

The decree of the trial court is affirmed.

AFFIRMED.

DENIS E. SULLIVAN, and BURKE, JJ. CONCUR.

Mrs. Fischer with a trust. In passing upon the question as to whether it is wrong for an attorney to deal with his client, the question is as to whether the transaction or contract is open, fair and honest. When deliberately made, such transactions or contracts, if open, fair and honest, are as valid as contracts between other parties. There is no evidence here that Mrs. Fischer acted as influence or otherwise the deceased, nor that there was anything done in influencing him to make the change in beneficiary. It is believed the evidence is clear that there was no effort made by Mrs. Fischer to exert influence or create the attitude of deceased to make a change in beneficiary under the insurance policies on deceased's life. In the case of Maher v. Wall, 268 Ill. 102, which we have followed, the court said, "An attorney is not prohibited from dealing with his client in buying his property (life insurance). Such contracts, if open, fair and honest, when deliberately made, are as valid as contracts between other parties."

There appearing to have been no influence, extortion or force used in the present case, we believe that the fact as they appear in this record justified the trial court in finding the issue for the defendant. Mrs. Fischer in disposing of the case for want of equity.

The decree of the trial court is affirmed.

DENIS E. SMITH, J., and others, JJ., concur.

41540

UNITED SERVICE STATIONS, INC., an
Illinois Corporation,
Appellee,

v.

SAMUEL W. ALPERT and ALPERT SUPER SERVICE,
INC., an Illinois Corporation,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

8.01A.200

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

Jane G. Manning leased to the defendant, Samuel W. Alpert, the entire premises located at and known as the northwest corner of Ogden and Western Avenues, Chicago, Illinois, from August 1, 1935, to July 31, 1940, at a rental of \$325.00 per month. On or about September 28, 1939, she and the defendant, Samuel W. Alpert, entered into an agreement reducing the rent on said premises, surrendering and cancelling the lease and allowing the defendant to remain in possession from and after April 1, 1940, as a month to month tenant. On the 17th day of May, 1940, a thirty-day notice was served on the defendant, Samuel W. Alpert. No notice was served on the defendant, Alpert Super Service, Inc., attempting to terminate the tenancy and demanding possession on July 1, 1940.

On May 20, 1940, Jane G. Manning entered into a lease with plaintiff, United Service Stations, Inc., for the premises described as:

"Lots Thirty-four (34), Thirty-five (35), Thirty-six (36) Thirty-seven (37) and Thirty-eight (38) in Court Commissioner's Subdivision of Block One (1) except the North four (4) acres thereof in Ogden's Subdivision, in Section 24, Township 39 North, Range 13 East of the Third Principal Meridian."

for the period commencing July 1, 1940, and expiring on June 30th, 1945.

On July 2, 1940, a forcible entry and detainer suit was started in the Municipal Court of Chicago by the plaintiff against the defendants, Samuel W. Alpert and Alpert Super Service, Inc. The defendants demanded a jury trial and the case was heard before Judge Charles S. Dougherty and a jury of ten men and women.

UNITED STATES OF AMERICA, INC., an
Illinois Corporation,
appellee,

v.

JAMES J. HANNAH and ALBERT J. ALBERT,
INC., an Illinois Corporation,
appellants.

MR. JUSTICE CLARK delivered the opinion of the Court.

James J. Hannah leased to his defendant, Albert J. Albert,

the entire premises located at and known as the Northwest corner
of Ogden and Western Avenues, Chicago, Illinois, from August 1,
1935, to July 31, 1940, at a rental of \$100.00 per month. On or
about September 28, 1939, and the defendant, Albert J. Albert,
entered into an agreement regarding the rent on said premises,
surrendering and cancelling the lease and allowing the defendant to
remain in possession from and after April 1, 1940, as a tenant for
month tenant. On the 15th day of May, 1940, a thirty-day notice
was served on the defendant, Albert J. Albert. No notice was served
on the defendant, Albert J. Albert, until after service, and, according to
testimony the tenancy of defendant, Albert J. Albert, on July 1, 1940.
On May 10, 1940, James J. Hannah entered into a lease
with plaintiff, United States of America, Inc., for the premises
described as:

"Lots Thirty-four (34), thirty-five (35), thirty-six (36), thirty-
seven (37) and thirty-eight (38) in the first subdivision of Block
One (1) except the lots shown in the plat of Block One (1) in
Subdivision in Section 24, Township 36 North, Range 12 East of
the Third Principal Meridian."

for the period commencing July 1, 1940, and terminating on July 1, 1940.

On July 1, 1940, defendant's lease was terminated and

expired in the month of July 1, 1940, and the defendant, Albert J. Albert,

the defendant, Albert J. Albert, entered a jury trial in the

defendant entered a jury trial in the month of July 1, 1940, and

Charles H. Hougherty and a jury of twelve

The plaintiff states that the facts, as stated in defendants statement of the case, are accurate and sufficient except that: On the 17th day of May, 1940, a thirty days notice addressed to Samuel W. Alpert, 1254 Western Avenue, was served on the defendant, Samuel W. Alpert; Samuel W. Alpert at that time was also the president of the Alpert Super Service, Inc.; the notice was signed by Jane G. Manning and read as follows;

"You are hereby notified that I have elected to terminate your month to month tenancy of the premises known and described as:

Lots Thirty-four (34), Thirty-five (35), Thirty-six (36), Thirty-seven (37) and Thirty-eight (38) in Court Commissioners' Sub-division of Block One (1) except the north four (4) acres thereof, in Ogden's Subdivision, in Section 24, Township 39 North, Range 13 East of the Third Principal Meridian, situated in the City of Chicago, County of Cook and State of Illinois.

on July 1, 1940, and You Are Hereby Notified to quit and surrender possession of the above described premises, together with the buildings, improvements and equipment thereunto appertaining, to the undersigned on the first day of July, 1940."

The judgment appealed from ordered that plaintiff have and recover from the defendants possession of the "premises described in the complaint herein, known as Lots 34, 35, 36, 37, 38, known as 1254 South Western Avenue."

From the facts as they appear in evidence, Jane G. Manning owned the property on the Northwest corner of Ogden and Western Avenues, Chicago, on July 18, 1935, on that date she entered into a lease, in writing and under seal, with Samuel W. Alpert for a period of five years from August 1, 1935, to July 31, 1940, at a rental of \$325.00 per month. Thereafter, on July 13, 1935, she entered into another lease with Alpert for the same property, the term being from August 1, 1940 to July 31, 1945. Samuel W. Alpert paid rent to her under the terms of the lease for the several years preceding the trial. On September 28, 1939, Samuel W. Alpert and Jane G. Manning executed a rider, in writing and under seal, to be attached to the lease of July 18, 1935, in which rider it was provided that "in consideration of the mutual covenants and agreements hereinafter set forth and the surrender and delivery to Jane G. Manning of lease dated July 31, 1935

owned the property on the northeast corner of 37th and
Chicago, on July 16, 1955. On that date, the property was
written and under seal, with a seal of the
years from August 1, 1955, to July 15, 1956, at a rental of \$100.00
per month. The rental, on July 15, 1956, was returned to the landlord
in full with interest for the period of one year, and the property was
1956 to July 15, 1956, annual rental of \$100.00, and the property was
returned to the landlord for the period of one year, and the property was
September 8, 1956, annual rental of \$100.00, and the property was
written, in writing and under seal, to the landlord, and the property was
July 16, 1955, in full with interest for the period of one year, and the property was
of the annual payments and payments in full, and the property was
returned to the landlord for the period of one year, and the property was

(said lease to commence on August 1, 1940 and expiring on July 31, 1945), and the cancellation and surrender of the within lease on March 31, 1940", beginning September 1, 1939, the rental on the premises was to be reduced from \$325.00 to \$250.00 per month, and that Samuel W. Alpert was to have the privilege of occupying the demised premises from and after April 1, 1940, as a month to month tenant, and until further notice given to him in writing by Jane G. Manning.

The property referred to in the lease and the rider was described as follows: "The Northwest corner of Ogden and Western Avenues, and further described as 1254 South Western Avenue, Chicago."

On May 17, 1940, a thirty days notice was served on Samuel W. Alpert. On that date, Alpert claimed in his testimony, both Samuel W. Alpert and Alpert Super Service, Inc. were in possession of the property involved. The notice contained the legal description and was addressed to Samuel W. Alpert at 1254 South Western Avenue, and demanded possession of the premises on July 1, 1940.

On July 2, 1940, plaintiff commenced this action against both defendants. On the summons the bailiff was directed to serve Alpert Super Service, Inc. at 1254 South Western Avenue, and the property was described in the complaint as;

"Lots 34, 35, 36, 37 and 38 in Court Commissioners' Sub-division of Lot 1 in Ogden's Subdivision * * *"

At the trial, Samuel W. Alpert testified that the gas station which he occupied was at 1254 South Western Avenue, located at the Northwest corner of Ogden and Western Avenues. He described the property as extending about 150 feet north of the corner of Ogden Avenue, and about 60 feet around the corner on Ogden Avenue with the northerly line of the property extending to Washburn Avenue and the back of the property to an alley. He also testified that he was in possession of the property described in the notice.

A witness, Herman Schroeder, who is employed by the City of Chicago in the City Map Department, testified from the counter books of the Map Department, which form part of the records regularly

(said lease to commence on August 1, 1940 and expire on July 31, 1943), and the obligation to pay the said lease on March 31, 1940, beginning September 1, 1940, the rental on the premises was to be reduced from \$25.00 to \$10.00 per month, and that Samuel W. Albert was to have the privilege of occupying the premises from and after April 1, 1940, as a tenant in common with the said and until further notice given to him by the said owner, and the said property returned to in the premises and after was

described as follows: "The Northwest corner of Union and Adams Avenues, and further described as 1334 Union Avenue, Chicago, Illinois." On May 17, 1940, a thirty days notice was served on Samuel

W. Albert. On that date, Albert claimed in his testimony, both Samuel W. Albert and Albert Junior, and was in possession of the property involved. The notice contained the legal description and was addressed to Samuel W. Albert at 1334 Union Avenue, and demanded possession of the premises on July 1, 1940.

On July 2, 1940, plaintiff commenced this action against both defendant. In his answer the defendant alleged to serve plaintiff proper notice, but, as 1334 Union Avenue, of the property was described in the complaint as:

"Lots 24, 25, 26, 27 and 28 in the Town of Chicago, Division of Lot 1 in Section 14, Township 36 North, Range 12 East, 2nd

At the trial, Samuel W. Albert testified that the premises which he occupied was at 1334 Union Avenue, located at the Northwest corner of 13th and Adams Avenues, and that the property as described in the complaint was the corner of the corner of Adams Avenue, and that the premises was the property of the Northern Trust Company, which was the owner of the property at the back of the property to an alley. He testified that in possession of the property described in the complaint.

Plaintiff, George Schneider, who is a resident of Chicago in the City of Chicago, testified that he had books of the Chicago Real Estate Board, which books contain a list of all the property in the City of Chicago, and that he had

kept there, that lots 34, 35, 36, 37 and 38 in Court Commissioners' subdivision of Lot 1 in Ogden's Subdivision, except the North 4 Acres thereof, in Section 24, Township 39 North, Range 13 East of the Third Principal Meridian, was located in the City of Chicago; that the property described was bounded on the north by West Washburn Avenue, on the east by Western Avenue, and on the south by Ogden Boulevard. On the west and to the rear, he stated, there was an alley, and that the lots had a frontage of approximately 150 feet on South Western Avenue, 108 Feet on Washburn Avenue, and about 60 feet on Ogden Avenue. He also testified that the street addresses of the lots were 2403-11 West Washburn Avenue, 1242-54 South Western Avenue, and 2402-06 Ogden Boulevard, under the city numbering system of giving a number for every twenty feet of street frontage.

Upon the trial, the defendants offered to prove that for two years or more, the Alpert Super Service, Inc., had paid the rent on the premises to Jane G. Manning, and that on September 12, 1939, Samuel W. Alpert had a discussion with Jane M. Manning and John Manning, her son, at which time Mrs. Manning told the defendant, Alpert, that if he would cancel the lease then existing between them and remain as a tenant from month to month, and if, in addition, he would "rehabilitate" the station, that upon the completion of such work she would give him a new lease for a period of five years, commencing July 1, 1940, and expiring June 30, 1945, at a rental of \$250.00 per month, and that in pursuance of such alleged agreement he did expend money in rehabilitating the station. An objection to the offer of proof was made on the grounds that it appeared that, subsequent to the conversations incorporated in the offer, there was a signed agreement between the parties under seal covering the subject matter; that the alleged verbal agreement for a lease for more than one year was in violation of the Statutes of Frauds; that the offer attempted to vary the terms of a written instrument, and were merged conclusively in that instrument which was introduced in evidence; and that the whole of the offer was incompetent and immaterial. This

and that the whole of the offer was intentional and fraudulent. It was conclusively in the instrument which was introduced in evidence; attempted to vary the terms of a written instrument by oral statements one year was in violation of the Statute of Frauds, and the other matter; that the alleged verbal agreement was made more than a year after the signed agreement between the parties and was subject to the requirement to the conversion thereof incorporated in the offer as a condition precedent to the offer of good will was made in the grounds for the offer of good will did expend money in rehabilitating the premises. The defendant in the \$250.00 per month, and that in payment of said rent the defendant had commenced July 1, 1940, and expiring June 30, 1941, at a rental of work she would give him a new lease for a period of five years, would "rehabilitate" the station, that she would have a right to such remain as a tenant from month to month, and if he would allow her that if he would cancel the lease there would be no further claim and Manning, he also, at which time Mrs. Manning told the defendant, Albert Samuel W. Albert had a discussion with John J. Manning and John Manning on the premises to John J. Manning, and on or about May 1, 1939, two years or more, the Albert Manning, Inc., had paid the rent Upon the trial, the defendant offered to prove that for every twenty feet of street frontage.

However, under the city planning system of giving a number for west Hubbard Avenue, 1848-54 south eastern Avenue, and 1402-56 eastern He also testified that the street addresses of the lot were 2403-11 Avenue, 108 feet on Hubbard Avenue, and about 60 feet on Union Avenue. The lot had a frontage of approximately 150 feet on both eastern On the west end to the north, he stated, there was no alley, and that property described was bounded on the north by the Hubbard Avenue Principal Meridian, as located in the City of Chicago; that the subdivision of lot 1 in Block 1, Addition, except the North corner thereof, in Section 24, Township 33 North, Range 17 East of the Third kept there, that lots 34, 35, 36, 37 and 38 in Court Commissioners' map

objection to the offer of proof was sustained, and the Jury directed to return a verdict in favor of the plaintiff. The direction to the jury and the verdict both found that the right of possession to "the premises described in the plaintiff's complaint herein" was in the plaintiff, and the judgment entered ordered that the plaintiff recover from defendants possession of "the premises described in the complaint herein, known as lots 34, 35, 36, 37, 38 known as 1254 South Western Avenue." The notice of appeal filed followed the same description of the property as was used in the complaint.

The first contention offered by defendants is that a separate parol agreement, not inconsistent with the terms or legal effect of the written instrument, on which it is silent, may be shown where it appears that the written instrument was not intended to be a complete and final statement of the whole transaction between the parties. Defendants submit that the testimony of Samuel W. Alpert with reference to the conversation with Mrs. Manning, in which both parties agreed to cancel the lease, if the defendant would, at some future time, rehabilitate the premises, and that, in that event, Jane C. Manning would give the defendant a new lease for a period of five years, should have been admitted, as that conversation did not attempt to vary or contradict the written agreement. It is suggested that this written agreement only cancelled the lease and stated the fact that defendant's tenancy should be one from month to month. In support of defendants' theory the case of Fuchs & Lang Co. v. Kittredge & Co. 242 Ill. 88, is cited, where the court said;

"The rule is a familiar one, but it is subject to the qualification that a separate parol agreement as to any matter not inconsistent with the terms or legal effect of the written agreement, and on which it is silent, may be shown, where it appears that the written instrument was not intended to be a complete and final statement of the whole transaction between the parties."

It is urged that the offer of proof was not inconsistent with anything in the written instrument and that the written instrument is silent as to the matters offered in the proof. It is also urged that the language of the court in the case of Gault v. Hunt, 183 Ill. App. 77,

[illegible]

is applicable to the facts in the instant case. The court in that case said;

"The parties testify that the attorney drawing the contract said it was unnecessary that these matters should go into the writing. Appellee and appellant agree in their testimony that there was a verbal agr arrangement which was omitted from the written contract, under the suggestion of the attorney, and therefore agree that the written contract was not a full statement of all that they had agreed upon. They differ entirely as to what the verbal agreement was. While it is usually the rule, where there is a written contract executed by the parties, that the writing contains the whole engagement of the parties, yet this is subject to the qualification that 'a separate parol agreement as to any matter not inconsistent with the terms or legal effect of the written agreement, and on which it is silent, may be shown, where it appears that the written instrument was not intended to be a complete and final statement of the whole transaction between the parties.' Fuchs & Lang Mfg. Co. v. Kittredge & Co., 242 Ill. 88."

However, the plaintiff does not agree with the defendants' contention in this respect, but urges that parol evidence is inadmissible to add to, contradict, or modify the terms of a written contract. It is urged that the courts have consistently recognized that when persons have entered into a written agreement, it is highly improbable that they could have previously entered into an oral agreement, the terms of which could have been inconsistent with the later agreement. The courts also recognize that if such a thing might have occurred, in an isolated instance, improbable though it might be, the parties must undoubtedly have meant later when they entered into a written agreement to amend their prior oral agreement by their later written agreement. The case of Keegan v. Kinnaird, 12 Ill. App. 484, is cited to support plaintiff's theory. The action there was one of forcible detainer, wherein the facts were very similar to the instant case. It appeared that the defendants had been in possession under a written lease made with a prior owner, and that after the expiration of the written lease they continued in possession paying rent to the new owner upon the same terms as in the written lease. The plaintiff, over defendant's objection, testified to conversations between himself and the defendants, the lessees, both before and at the time of the making of the written lease tending to show that the parties had agreed that after May 1, 1890, the lessees were to remain in possession

of the property involved, but as tenants from month to month. The lower court found for the plaintiff on the ground that by the oral agreement, defendants became tenants from month to month, rather than from year to year, as they would have if there were no agreement, and were thus entitled to only a 30 days notice rather than a 60 days notice prior to the end of the year. The appellate court reversed the judgment for the plaintiff in the lower court, stating its grounds as follows, at page 489;

"We think also that the court erred in allowing plaintiff to give evidence of the alleged parol agreement, made contemporaneously with the execution of the written lease, to the effect that the defendants or Rose Keegan might remain in the occupation of the demised premises on and after the day of the expiration of the lease, but as tenant from month to month, subject to a notice of thirty days, to quit. The lease made under seal and inter partes, contained an express covenant that the lessees, the defendants, would surrender up the demised premises to the lessor at the expiration of said lease, which would be May 1, 1880."

and the court there goes on to say;

"It cannot be questioned that such contemporaneous parol agreement was in direct conflict with that covenant. Suppose that upon the expiration of the written lease the defendants had relied upon that parol agreement, so made, and held over in virtue of it; but that the lessor or his grantee, who was in privity with him, had brought an action of forcible detainer for the possession, or had brought an action upon such covenant, to surrender up the premises at the end of their term, to recover damages for a breach of it, would it have been competent for the defendants to set up and prove such contemporaneous parol agreement, as a defense in either of such actions? Most clearly it would not, because that would not only be to allow a party to an instrument under seal, to give parol evidence to vary, contradict, or nullify one of its express provisions, but it would be to allow the admission in evidence and give vitality to a parol agreement in reference to the same subject-matter, made at the same time with the written one, and which, by the settled rules of law, must be regarded as merged in the writing. * * *

"If such contemporaneous parol agreement was merged in the written lease, or in other words, was not provable by the lessees, then, by parity of reason, it was not by the lessor, or by the plaintiff, who was a privy. Such parol agreement, made under the circumstances as above stated, was wanting in legal vitality, as respected both the plaintiff and defendants."

See also Harmony Cafeteria Co. v. International Supply Co., 249 Ill. App. 532, and Ross v. Griebel, 136 Ill. App. 399,

After a close study of this question we are rather of the opinion that the offer of proof would have contradicted and varied the terms of the written agreement which was entered into, signed and sealed by the parties, and that such offer of proof was inconsistent

with the terms of the written agreement. Therefore we believe that the court was justified in ruling as it did.

There is a further contention by the defendants that a notice to terminate a tenancy from month to month must give the tenant at least thirty days notice and should expire on the last day preceding the rent day. It appears from the briefs and is admitted that the rent under the written lease was due on the first of the month and the rider cancelled the lease and created a tenancy from month to month, and that from and after April 1, 1939, the rent was due on the first of the month. The defendants contend that the thirty-day notice was insufficient to terminate this tenancy, since the notice was served on May 17, 1940, attempting to terminate the tenancy on July 1, 1940, and demanding possession on July 1, 1940. It is contended with due regard to the cases that have been decided that this notice is insufficient to terminate the tenancy, and defendants submit for reconsideration of this court whether or not this notice was sufficient to terminate the tenancy assuming all other matters in it were correctly set forth. The case of Prickett v. Ritter, 16 Ill. 96, is cited, where the court said;

"The authorities all seem to agree that where notice is required, it must be given a due length of time before, and terminate with a regular period in the tenancy, that is, at the end of a year, half year, quarter, month, or week, according to the party's right to terminate it by the notice."

There is also cited the case of Bedell v. Clark, 151 Ill. App. 419, where the court upon a like question said;

"The notice served in this case indicates that the appellees regarded the tenancy of appellant as one from month to month, and that he was entitled to thirty days' notice to quit. We think this is the correct view of the matter. If, as is shown by the evidence, the last payment of rent was for the month of August, and it was desired to terminate appellant's tenancy at the end of that period, the notice should have been given to him to surrender on the last day of August, as that month would expire on that day of August, as that month would expire on that day at midnight. At least this is the latest date the notice should have specified to enable the appellees to bring their suit on September 1, 1908, Prickett v. Ritter, 16 Ill. 96; Wade on Notice, sections. 609, 610, 611."

It is further there said by the court;

" * * * Neither is it sufficient that the notice may give more days' notice than was required. It fixed the date of delivering up possession on a day certain, September 1, 1908; and the appellant by that notice had the whole of that day in which to deliver the premises or vacate them, that is, until midnight of that day, and the suit was therefore prematurely brought."

The defendants in their brief state that they are not unmindful of the decision in the case of Necros v. Tedtman, 238 Ill. App. 220, where the court attempted to distinguish the Bedell case, but urge with due deference to the judges who decided that case, that the decision in that case was erroneous and should not be followed. The defendants, therefore, urge earnestly that it is better to overrule an erroneous decision than to attempt to distinguish it, and ask that this court by its decision in this case, clear up this question by stating the law to be that a notice to terminate a month to month tenancy must expire the last day preceding the rent day.

In studying the case of Necros v. Tedtman, 238 Ill. App. 220, it is best to have in mind what this court said in that case upon questions of like character as those involved in the present appeal. The court in its decision there said;

"If, as contended, the monthly term ended at midnight of the 14th, there would still have been compliance with the statutory requirement of a sixty-day notice to quit (see section 6, Landlord and Tenant Act, as amended April 29, 1921), (Cahill's St. Ch. 80, Par. 6), for the sixtieth day after October 15 ended on the 14th day of December. The purposes of a notice in a tenancy from month to month are to inform the tenant when his tenancy will terminate and to give him adequate time to prepare to surrender. Both of these purposes are met by the notice in question, whether the monthly term actually ended on the 14th or the 15th. And if plaintiff saw fit to give defendant an additional day of grace in which to move from the premises, that did not, either impliedly or by construction of the law of notice, establish a new tenancy for another month, according to authorities in other jurisdictions. To hold (that) it did would seemingly be inconsistent with the object and purpose of giving the notice."

This court, in support of its conclusion in the Necros case, cites Detroit Sav. Bank v. Bellamy, 49 Mich. 317, where the notice to quit required surrender on May 1, and objection to it was that it should have required the surrender April 30. In that case, Mr. Justice Cooley said that the error, if any, was not material and that the objection was "too nice and technical", and that "the notice gave

the party the necessary information and was intended to terminate the tenancy at the proper time". This court in the Negroa case further said;

" * * * There was the same ruling to like objections made to like notices in Searle v. Powell, 89 Minn. 278, and Steffens v. Earl, 40 N.J.L. 128. In the former it was said that while it was proper to notify the tenant to remove on the day his monthly term expires, a notice is not insufficient or defective which notifies him to vacate the following day. The court said, 'Granting him a favor in this respect is no sufficient reason why the tenant should be permitted to take technical advantage of kindness and good will.' In Steffens v. Earl, supra, while the court recognized that the term in that case probably terminated on the last midnight of July, it said that to hold that a notice given for the day commencing at that midnight is not a good notice, was to carry the rule that the notice to quit must be made with reference to the end of the term, 'to an illogical and unreasonable length'."

It is to be noted from an examination of the present case that likewise here the tenant was given the necessary information as to when his tenancy was to be terminated, and he was given more than the requisite time to prepare to surrender. In the Negroa case the court discussed the case of Bedell v. Clark, 151 Ill. App. 419, and pointed out that the Bedell case was likewise a forcible detainer case involving a month to month tenancy. The notice was there served on July 29th, requesting delivery of possession on September 1st, and suit was commenced on September 1st. It was further pointed out that the suit was brought prematurely in the Bedell case since, according to the notice, the defendant had the privilege of moving at any time during that day (September 1st). For that reason this court held that the Bedell case did not apply, and we quite agree, since there is here no question as to this suit having been prematurely brought.

In the instant case it appears that the landlord gave an additional day for the tenant to move and surrender possession. Still, that would not raise any theory upon which the defendant could claim that the landlord would hold him subject for an additional month's rental. It was the landlord who waived her right, if she had any,

the January at the present time," said Roberts and he was not

There was the one ruling to the effect that the notice in Beale v. Bessie, 100 N.W.2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911,

the majority view to require to support it. In the majority of the
to when his attorney was terminated, and he was then were that
that likewise have the right to receive the necessary information
court discussed the case of Leibel v. C. R. H. Co., 101 F.2d 101, and

[illegible]

that the landlord would not be subject to the same liability as the tenant. It was the landlord who was liable for the damage to the property, and the tenant was not liable for the damage to the property. The landlord was liable for the damage to the property, and the tenant was not liable for the damage to the property.

by giving a 30 days notice. After considering the authorities and the reasoning in the Necros case, we are not inclined to disregard the Necros case in its reasoning as applied to the instant case.

There is another question that we think should be considered and that is the contention of the defendant that the description in the 30 days notice was insufficient to support a judgment in this case. Our attention is called to the notice to terminate the tenancy, which describes the premises as "Lots Thirty-four (34), Thirty-five (35), Thirty-six (36), Thirty-seven (37) and Thirty-eight (38) in Court Commissioners' Subdivision of Block One (1) except the north four (4) acres thereof, in Ogden's Subdivision in Section 24, Township 39 North, Range 13 East of the Third Principal Meridian, situated in the City of Chicago, County of Cook and State of Illinois." It is urged in this regard that this notice does not include any street numbers or address, and that the complaint in this case asked for possession of the premises as above legally described, and adds the words "also known as 1254 South Western Avenue, Chicago, Illinois." We have in mind that the defendant, Samuel W. "Ipert, in his testimony, testified that he was in possession of the premises as described. He had notice of that fact - and of what premises were intended - by the notice that was served upon him, and he acknowledged that he was in possession of the premises as described in the notice. There is no contention made that the property described in the notice and the property described in the complaint and judgment is not the same property. It has been frequently said, with regard to judgments in forcible detainer cases, that a judgment in such a case is proper if it identifies the property involved sufficiently to enable the officer executing the writ of assistance to find it. In Gaire and St. Louis Railroad Company v. Wiggins Ferry Company, 82 Ill. 230, which was a forcible detainer suit, the premises were described by lot numbers both in the complaint and in the judgment. In upholding the judgment the court said;

by giving a 30 days notice. It was learned that the premises are
the reasoning in the Hecker case, and the fact that the premises are
the Hecker case in the reasoning is applied to the instant case.
There is another question as to whether the premises should be considered
and that is the contention of the defendant that the possession in
the 30 days notice was insufficient to support a judgment in this case.
Our attention is called to the notice in Hecker the January, which
describes the premises as "Lot thirty-four (34), thirty-five (35),
thirty-six (36), thirty-seven (37) and thirty-eight (38) in Group
Commissioners' Subdivision of Block No. (1) east of the north four (4)
acres thereof, in Oden's Subdivision in Section 16, Township 33 North,
Range 13 East of the Third Principal Meridian, situated in the City
of Chicago, County of Cook and State of Illinois." It is noted in
this regard that this notice does not include any street names or
address, and that the complaint in this case, and the description of
the premises as above legally described, and a copy of the same
known as 1254 South Western Avenue, Chicago, Illinois, to have in
mind that the defendant, James J. Hecker, in his testimony, testified
that he was in possession of the premises described in the notice
of that fact - and of what premises were located by the notice and
was served upon him, and he acknowledged that he was in possession of
the premises as described in the notice, and that he was in possession of
that the property described in the notice was the same property described in
the complaint and judgment in the Hecker case, and that the premises
frequently said, with regard to judgment in the Hecker case, that
that a judgment in such a case is proper, and that the premises
involved sufficiently to enable the court to render a judgment
assistance to find it. In Hecker the court said, "The premises
William Perry property, as 1254 South Western Avenue, Chicago, Illinois,
the premises were found to be the same premises as those described
in the judgment, and the court rendered a judgment in favor of the

"It is next claimed by the defendant, that the premises are not described with reasonable certainty. The description, by the numbers of the lots, location and the manner in which they are used, would seem to be as definite and certain as if the premises had been described by metes and bounds. Any description by which the premises could readily be identified and located, is all that could be required. That has been given, and we consider it sufficient."

See also, Foster v. Rudis, 196 Ill. App. 174; Szulerecki v. Oppenheimer, 218 Ill. App. 508. From the notice as given and the evidence in this record, we are satisfied that the judgment entered was sufficient to identify the property and aid the officer in executing the writ.

The further question that defendants call attention to is that the defendant, Alpert Super Service, Inc., was entitled to be served with notice to quit. Well, it does not appear in the record that there is any evidence that would indicate this defendant was in possession by virtue of any assignment of the lease whether consented to by plaintiff or otherwise, or by virtue of a breach of the terms of the lease by the defendant, Samuel W. Alpert, used the Alpert Super Service, Inc. to pay the rent to the plaintiff. There is nothing in this record that would indicate that the plaintiff or Jane G. Manning, lessor, ever recognized the defendant, Alpert Super Service, Inc., as a tenant, or as having a direct interest in the possession of the premises involved. There is nothing upon which defendants rely to show an interest in the corporation, except an offer to show that rent was paid by it to Jane G. Manning. Under the circumstances, we believe that the court concluded rightly in entering judgment on the directed verdict of the jury for possession in favor of the plaintiff.

For the reasons herein stated, the judgment is affirmed.

AFFIRMED.

DENIS E. SULLIVAN AND BURKE, JJ. CONCUR.

41573
ARNOLD GROTH,

APPEAL FROM

Appellee,

331
MUNICIPAL COURT
OF CHICAGO.

v.
SCHUENEMAN-FLYNN'S LOGAN SQUARE, INC.,
a corporation,

Appellant.

310 I.A. 260²

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

This is an appeal by Schueneman-Flynn's Logan Square, Inc., an Illinois corporation, defendant in the court below, to reverse an order of the Municipal Court entered on August 2, 1940, which order denied the motion and petition of defendant for leave to appear and defend against the suit of plaintiff, wherein judgment was entered on May 1, 1940, against defendant, and the motion to quash the alleged service of summons herein which gave the court jurisdiction of said defendant. Suit was filed by plaintiff and summons issued on March 1, 1940, returnable March 12, 1940, and the return was endorsed by the Bailiff "served the within writ upon defendant, on March 2, 1940, by leaving a copy thereof, together with a copy of the papers attached thereto stamped by the Clerk 'a true copy' with Mary Roe, agent, who refused to give true name, an agent of said defendant found in the City of Chicago." An order was entered on March 12, 1940, defaulting defendant for failure to appear and answer after personal service, and an ex parte judgment for \$550.00 and costs was entered on May 1, 1940, for plaintiff and against defendant.

Thirty-five days after judgment, execution was delivered to the Bailiff for service and returned endorsed "Demand of defendant * * * by delivering a copy thereof to Mary Roe, agent who refused to give her true name of said corporation on June 6, 1940." On July 2, 1940 - within thirty days after service of execution - a petition to vacate judgment and quash service of summons, and asking leave to appear and defend, was filed by defendant, alleging no service of summons and no jurisdiction over the defendant when judgment was entered and that

JULY 1940

OR. 1940

JULY 1940

v.

JOHN ANNOLD, JR.,
a corporation

81-011-260

MR. PRESIDENT JUDICIAL PANEL, THIS IS A REQUEST FOR A WRIT OF HABEAS CORPUS.

This is an appeal by defendant-Appellant, John Annold, Jr.,

an Illinois corporation, defendant in the court below, to reverse an

order of the Municipal Court entered on August 1, 1940, which order

denied the motion and writ of habeas corpus for leave to return and

defend against the writ of attachment, wherein judgment was entered

on May 1, 1940, against defendant, and the writ was issued and the

service of summons herein which gave the court jurisdiction of said

defendant. Said writ was filed in said court on March 1,

1940, returnable March 15, 1940, and was returned and ordered by the

Court to be served on the writ with writ of attachment, on March 1, 1940,

by leaving a copy thereof, for three copies, to the clerk of said court, who

thereby attested by the clerk to true copy, with my seal, and

refused to give true copy, as stated in the

City of Chicago. In order to obtain a copy of said writ, defendant

defendant for failure to do so, the court entered judgment, and

an ex parte judgment for \$25.00, and the court entered judgment

for said writ and against defendant.

The writ for service of said writ was returned on March 1, 1940,

by delivering a copy thereof to the clerk of said court, who

true name of said court is John Annold, Jr., and

within thirty days after service of said writ, judgment and

summons and such service of summons, and the writ was filed by said

defendant, was filed by said defendant, and the court entered judgment

defendant had a meritorious defense, namely, that defendant was not negligent, and that the injuries, if any, were caused by plaintiff's negligence, and that the judgment was excessive.

The plaintiff in this action filed a motion to dismiss said petition, alleging no adequate showing in the petition; that the Court was without jurisdiction to entertain the petition; that the bailiff's return on the summons could not be attacked; and that no errors of law or fact are set out. A counter affidavit, by leave of court, was thereafter filed by plaintiff, which defendant charges reaffirms substantially everything set out in plaintiff's motion to dismiss.

Over the objections of the defendant, the court heard oral testimony in support of plaintiff's motion to dismiss and affidavit, and at the conclusion of the hearing denied the defendant's petition for leave to appear and defend and to quash service of summons.

The defendant in the action operated an establishment wherein bowling and billiard and pocket billiard playing was featured at 2548 Milwaukee Avenue, Chicago, Illinois. Plaintiff alleged in his statement of claim that he was a patron in defendant's establishment, and while there fell down an open trap door, sustaining injuries.

The defendant filed its petition for leave to appear and defend and to quash alleged service of summons, setting out that the first knowledge it had of the suit was when execution was served upon it; that the statutes and rules of court had been violated in attempting service of summons, and that no agent, employee or officer of defendant had been served with a summons; that it had no person named Mary Roe in its employ, nor was she an officer or agent of the defendant; that it had adjusted with the plaintiff before the suit his claim for alleged injuries for \$75.00, and that the judgment, which was for \$550.00 and costs, was excessive in all sums over \$75.00; that it had a meritorious defense to the action, namely, that it was not negligent in causing the injuries to the plaintiff, that the injuries, if any, were caused by the plaintiff's own negligence, and that the judgment was excessive. The petition concluded by offering

to comply with any suggestion of the court as a penalty for being permitted to appear and defend after judgment and after execution had been issued.

On July 25, 1940, an order was entered by the court overruling plaintiff's motion to strike the defendant's petition to vacate the judgment. By the same order the court gave the plaintiff leave to file counter-affidavits in five days and continued the motion of the defendant to vacate the judgment to August 1, 1940. On the 29th day of July, 1940, plaintiff filed his answer to the petition of the defendant to vacate the judgment. No counter affidavits were filed by plaintiff at any time. On August 1, 1940, the matter was continued to August 2, 1940, on which day a hearing was had on the petition of the defendant to vacate the judgment on the answer of the plaintiff to that petition. At this hearing defendant counsel, Mr. Falkenberg, stated:

"This argument comes up, if the court please, on defendant's motion to quash the service of summons and to set aside and vacate the judgment and for leave to appear and defend on such terms as the court may indicate. In the meantime, since our last hearing last Thursday counsel has, pursuant to order of court, filed his answer. I assume it comes up on petition and the answer."

To a question by the court, Mr. Falkenberg answered, "I don't want to introduce evidence and I don't want the court to permit the plaintiff to introduce any". Thus the defendant refused to introduce any evidence in support of his petition to vacate the judgment, insisting that such procedure was not proper, that "the proper practice on a motion such as we have is that it be heard only by petitions and affidavits or oral evidence of the moving party, that is, the defendant". The plaintiff then made a motion for a finding in his favor, and after some argument introduced evidence by calling the witness Shirley Kanarish. Also, plaintiff called Tony J. Petrone, the deputy bailiff who served the process in this case and the execution. Defendant's counsel then changed his mind and took part in the proceeding and cross examined deputy Petrone. Counsel also called, in defendant's behalf, the witness, James P. Flynn, Jr. At the conclusion of the hearing, Mr. Levin counsel for plaintiff, referring

to comply with any suggestion of the court as to a remedy for being permitted to appear and defend after judgment and after execution and been issued.

On July 25, 1940, an order was entered by the court over-

ruled plaintiff's motion to set aside the defendant's decision to

vacate the judgment. By the same order the court ordered the plaintiff

leave to file counter-claim in the case and to continue the motion

of the defendant to vacate the judgment to August 1, 1940. On the

29th day of July, 1940, plaintiff filed his answer to the motion

of the defendant to vacate the judgment. No counter-claim was

filed by plaintiff at any time. On August 1, 1940, the matter was

continued to August 2, 1940, on which day a hearing was had on the

petition of the defendant to vacate the judgment on the basis of the

plaintiff to that petition. At a hearing between counsel,

Mr. Falkenberg, stated:

"This argument comes up, is the court, I see, on defendant's motion to grant the service of judgment and to set aside and vacate the judgment and for leave to appear and defend on such terms as the court may impose. In the meantime, since our last hearing last Thursday counsel has, pursuant to order of court, filed his answer. I assume it comes up on motion and the matter.

To a question by the court, Mr. Falkenberg answered, "I don't want to

introduce evidence and I don't want to set aside the judgment.

to introduce any." Thus the defendant refused to introduce any

evidence in support of his motion to set aside the judgment, insisting

that such procedure as not proper, but that he was willing to

action such as we have to find it is a matter of procedure and

affidavits or real evidence. I am moving, yes, this, the

defendant. The plaintiff then made a motion, not stating in the

favor, and after some argument introduced evidence by calling the

witness Shirley Kennedy. Also, plaintiff called one E. Brown,

the deputy sheriff who served the process in this case and the

execution. Defendant's counsel then changed his mind and took part in

the proceeding and cross examined deputy Brown. Plaintiff also called

in defendant's behalf, the witness, James J. Brown, Jr. and

conclusion of the hearing, Mr. Levin counsel for plaintiff, the

to the motions made at this hearing for a finding in favor of the plaintiff, stated; "I am again renewing my motion. I renew all my other motions and all the statements that I made. I am asking that the petition of the defendant be dismissed." Whereupon the court denied the defendant's motion to vacate the judgment and to quash the service of summons.

In the trial court defendant's counsel first insisted that the proper procedure upon the motion to vacate the judgment was to take the allegations of the petition as true; that the plaintiff's answer to defendant's petition should not be considered. He refused to introduce evidence and objected to plaintiff's doing so. As the hearing progressed, counsel abandoned that position and took part in the proceeding, cross examining a witness for the plaintiff and also calling a witness in defendant's behalf.

The facts with respect to service of summons in this are that; (1) the return of the bailiff shows service according to law; (2) deputy bailiff Petrone points out Shirley Kanarish as the person upon whom the copy of the summons together with a copy of the praecipe and statement of claim was served, and says that he had served other writs on Shirley Kanarish before he served the summons in the instant case. As to whether or not Shirley Kanarish was an agent of the defendant corporation, it appears that she was employed by the defendant on the day the summons was served and had been so employed for over three years prior thereto. As against this evidence, the defendant produced the testimony of James P. Flynn, Jr., that he visits the office of the defendant every day as does another officer of the corporation, his wife, Audrey; that he received from no source, a copy of the summons in this case; and that he at no time had in his employ any person named Mary Roe. As before indicated the facts concerning service of summons are that the bailiff's return shows service according to law, that the deputy bailiff who made the service pointed

to the motions made at the hearing for a finding in favor of the plaintiff, stated; "I am again renewing my motion. I renew all my other motions and all the statements that I made. I am asking that the petition of the defendant be dismissed." Whereupon the court denied the defendant's motion to vacate the judgment and to grant the service of summons.

the proceeding, cross examining a witness for the Plaintiff and also hearing progressed, counsel suggested that a motion be made to the court to introduce evidence and objected to Plaintiff's doing so. At the answer to defendant's petition should not be considered. He refused take the allegations of the petition as true; that the Plaintiff's the proper procedure upon the motion to vacate the judgment was to in the trial court defendant's counsel later insisted that calling a witness in defendant's behalf.

The facts with respect to service of summons in this case are that; (1) The return of the sheriff shows service according to law; (2) Deputy Sheriff returned a return out of the county upon whom the copy of the summons together with a copy of the complaint and statement of claim was served, and says that he had served either writs on Shirley Karamian before he served the summons in this instant case. As to whether or not Shirley Karamian was an agent of the defendant corporation, it appears that she was employed by the defendant on the day the summons was served and he was employed for over three years prior thereto. He advised this court that the defendant produced the testimony of James A. Flynn, Jr., that he visited the office of the defendant every day as does James Flynn, Jr. and corporation, his wife, Audrey; that he received from the corporation a copy of the summons in this case; and that he was in the office of any person named Mary Ann. He did not believe that Mary Ann was serving service of summons and that the sheriff's return shows service according to law. That the deputy sheriff who made the service pointed out to him that the summons was not served on the defendant.

out Shirley Kanarish as the person upon whom service was had, and that Shirley Kanarish was then and for three years prior thereto had been employed by the defendant. When we come to consider these facts as they have been quoted here, we think that the court did not err in denying the defendant's motion to vacate the judgment.

The first point called to the attention of this court is the defendant's contention that if it is clear from the evidence that the defendant has not been served the judgment should be set aside. In support of this contention the case of Owens v. Banstead, 22 Ill. 161, is cited. Also cited in support of this theory of defendant is the case of Nikola v. Cosmos Towers Apts. Bldg. Corp., 303 Ill. App. 516, where it appears from this authority that the proceedings were had in the Circuit court of Cook County, whereas this instant case was one in the Municipal Court of Chicago. It is suggested in defendant's argument that in each case an ex parte judgment was entered and damages assessed against the defendant, and that in each case more than thirty days elapsed between the entry of the judgment and the date on which execution was issued. The petition to vacate judgment was presented to the court in the Nikola case fifty-three days after execution was issued and eighty-eight days after the date judgment was rendered. In the instant case, the petition was filed twenty-six days after execution was delivered to the bailiff and sixty-two days after judgment was rendered. In each of these cases the alleged service was had upon an agent of the corporation, but in the Nikola case the agent was recognized by the defendant as its agent, whereas in the instant case - it is claimed by defendant - Mary Roe was not recognized as an agent by the defendant. The question involved in the Nikola case is one, where the defendant is attempting to contradict the return of the court officer on the summons after the term of court had ended in which judgment was rendered; and in the instant case a like attempt is made more than thirty days after judgment had been rendered. In each case the plaintiff filed a motion to dismiss. In the Nikola case

out Shirley Kershner as the person who was arrested, and that Shirley Kershner was then and there a person who was not employed by the defendant. When it came to consider these facts as they have been stated here, it is clear that the court is not in denying the defendant's motion to vacate the judgment.

The first point called to the attention of the court is the defendant's contention that it is clear from the evidence that the defendant has not been served the judgment should be set aside. In support of this contention the case of Tracy v. Husted, 111 Ill. 101, is cited. Also cited in support of this theory of defendant is the case of Wicks v. Kansas Power & Light Co., 101 Ill. 2d 318, where it appears from this authority that the proceedings were held in the Circuit Court of Cook County, whereas this judgment was entered in the Municipal Court of Chicago. It is clear from the evidence that in each case an ex parte judgment was entered and no notice was given to the defendant, and that in each case more than thirty days elapsed between the entry of the judgment and the date on which execution was issued. The motion to set aside the judgment was made to the court in the Wicks case fifty-three days after the entry of the judgment and eighty-eight days after the entry of the judgment in the Tracy case. In the instant case, the motion to set aside the judgment was made to the court on the day of the entry of the judgment and the date on which execution was delivered to the sheriff was fifty-three days after the entry of the judgment. In each of these cases the alleged service was recognized by the return of the sheriff, whereas in the instant case - it is claimed by defendant - they were not recognized by the sheriff. The motion to set aside the judgment was made by the defendant. The motion to set aside the judgment was made one, where the defendant is contending to set aside the judgment of the court officer on the evidence that the date of entry of the judgment which judgment was rendered; and in the instant case, it is claimed that is made more than thirty days after judgment was rendered. In each case the plaintiff filed a motion to set aside the judgment.

the court did not expressly rule on the plaintiff's motion to dismiss the petition, whereas in the instant case the defendant suggests that the court overruled plaintiff's motion to dismiss and gave leave to plaintiff to file counter affidavits.

Then defendant goes on to make the further suggestion that counter affidavits are not admissible to controvert the matters of defense stated by the affidavits of the defendant on a motion to set aside a default and judgment and for leave to plead, in support of which is quoted from the case of Mendell v. Kimball, 85 Ill. 582, as follows;

"The record in this case shows that counter-affidavits were read by plaintiffs on the hearing of the motion to set aside this default. This is a vicious practice. * * * Such motions should be determined upon the ex parte affidavits in support of the motion. * * *

The plaintiff, in reply to defendant's suggestion that it had not been served with summons and that the judgment should have been set aside, states that service of process on a private corporation carrying on business in the City of Chicago may be made by leaving a copy thereof together with a copy of the papers attached to it stamped by the clerk "A True Copy" with any agent of such corporation found in the city. There are a number of cases cited by the parties on the question of service of summons upon an agent who declined to give his or her name when service was had. In the case of Davis v. Dresback, et al., 81 Ill. 393, the court, upon a question of like character as before us in the instant case, said;

"The return of the sheriff, indorsed upon the summons, shows that appellees were duly served with process; this was supported by the evidence of the deputy sheriff, who testified that he served the summons at the time and in the manner stated in the return.

"For the purpose of impeaching the return of the sheriff the appellees were sworn, and testified that they were never served with process in the case, either by the sheriff or his deputy."

And again the court there said;

"But while resort may be had to parol proof for that purpose, the rights of parties and sound public policy require that a return of a sworn officer should not be set aside except upon clear and satisfactory evidence.

"If the return of a sheriff can be impeached and a judgment and decree vacated upon the evidence alone of the defendant, who has been served with process, that stability which characterizes our judicial proceedings will be lost and a wide door will be opened for the temptation to commit perjury by the unscrupulous.

"The return of a sheriff on process is made in due regard to his duty as an officer as well as his official oath, and, besides, he well knows that for a false return he and his sureties are liable upon his official bond. These restraints are ordinarily sufficient to keep a sheriff within the line of his duty, as well as to protect those who may be sued from a false return."

In examining Deputy Bailiff Petrone, counsel for the defendant made much of the fact that as to details the deputy had no independent recollection. In a similar case, Marnik v. Cusack, 317 Ill. 362, where an attempt was made to impeach the return of a sheriff, the court said;

"The only question necessary for our determination is whether the return has been impeached by such clear and satisfactory evidence as to show that the summons was not served on the plaintiff in error. Marnik testified that the summons was not served upon him and he knew nothing of the suit until after the term at which the judgment was rendered. The return of the summons was made by Larsen, a deputy sheriff, whose duty it was to serve writs in the district in which Marnik lived."

The court further said;

"The testimony of Larsen and Kruckstein amounts to nothing, either to assist or impeach the service. Neither has any recollection but both rely upon their written memoranda. We must do the same, and the well established rule is that the return showing service cannot be overcome by the uncorroborated testimony of the defendant. The failure of the officer making the return to remember the service is not such clear and satisfactory proof that service was not made as to impeach the return."

However, counsel for the defendant in his brief insists that the motion to vacate the judgment should have been decided upon his petition alone - that it was error to permit plaintiff to introduce evidence in support of his answer to that petition. This view, as stated by plaintiff, has been urged upon the courts before without success. In the case of McKenna v. Forman, 283 Ill. App. 606, a judgment was confessed on January 18, 1933, and execution was issued on May 31, 1934. The defendant filed a petition to vacate the judgment on June 15, 1934. Plaintiffs filed a sworn answer to the petition to vacate on February 19, 1935. On March 8, 1935, the trial court refused to hear

or to set down for hearing the defendants' motion to vacate the judgment on their petition and the plaintiffs' answer thereto, but entered the following order;

"Now comes the defendants and move the court that the judgment rendered herein by confession be vacated and set aside, which motion the court orders entered; and it is further ordered that said judgment be opened, that leave be and hereby is given to the defendant to appear and to make defense herein; that the trial of this cause be had notwithstanding said judgment; that said judgment stand as security; and that execution herein be stayed until the further order of this court; and that the affidavit is to stand as affidavit of merits."

On appeal of the case just above cited the plaintiff sought to vacate the above quoted order, granting leave to defendants to appear and defend without allowing the plaintiffs a hearing on the issue raised by the defendant's petition to vacate and the plaintiffs' answer thereto. The order was reversed and the cause remanded with directions to allow the plaintiffs a hearing on their answer to defendants' petition to vacate the judgment.

In considering all of the facts as we have related them in this opinion, we are of the opinion that the order of the trial court denying the motion and petition of defendant to vacate the judgment was properly entered, and under the circumstances of this case we believe that the judgment of the court should be affirmed.

AFFIRMED.

DENIS E. SULLIVAN AND BURKE, JJ. CONCUR.

41339

PEOPLE OF THE STATE OF ILLINOIS, ex rel.,
CLAUDE R. HENDERSON,

Appellee,
v.

ROBERT J. DUNHAM, President of the Chicago
Park District and of the Civil Service
Board of the Chicago Park District; PHILIP
S. GRAVER, Commissioner of the Chicago Park
District and member of the Civil Service
Board of the Chicago Park District; BLAINE
HOOVER, Superintendent of Employment and
Secretary of the Civil Service Board of
the Chicago Park District; GEORGE T. DONOGHUE,
General Superintendent of the Chicago Park
District,

Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

310 I.A. 261

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Relator filed his amended petition in the Circuit Court of Cook County against Robert J. Dunham, President of the Chicago Park District and of the Civil Service Board of that district, Philip S. Graver, Commissioner and member of the Civil Service Board thereof, Blaine Hoover, Superintendent of Employment and Secretary of the Civil Service Board thereof, and George T. Donoghue, General Superintendent thereof, alleging that he was illegally discharged from the position and grade of chauffeur, and was being illegally deprived of employment in said grade and position, and seeking a writ of mandamus, commanding the defendants to place the name of relator upon the re-employment list for the position of chauffeur in the classified service, to certify his name from said re-employment list to the general superintendent and commanding the general superintendent to re-employ and re-assign him as a chauffeur, to the end that he be recognized and reassigned to duty with the right to continue in the performance of the duties of said position and to receive the salary and wages lawfully provided therefor from May 13, 1938, until removed. Defendants answered the amended petition. The case was tried before the court without a jury. The court found the issues in favor of relator and entered a judgment directing defendants to reinstate him and assign him to his position forthwith,

PEOPLE OF THE STATE OF ILLINOIS, ex rel.,
CLAUDE A. HENON, JR.,

Respondent.

ROBERT J. DUNBAR, President of the Chicago
Park District and of the Civil Service
Board of the Chicago Park District; WILLIAM
S. GRAYSON, Commissioner of the Chicago Park
District and member of the Civil Service
Board of the Chicago Park District; ALBERT
HOOPER, Superintendent of Employment and
Secretary of the Civil Service Board of
the Chicago Park District; GEORGE E. HENON, JR.,
General Superintendent of the Chicago Park
District.

Respondents.

CHICAGO, ILLINOIS.

MR. JUSTICE CLARK, Circuit Court of Cook County.

Plaintiff filed his amended petition in the Circuit Court

of Cook County against Robert J. Dunbar, President of the Chicago

Park District and of the Civil Service Board of the District,

William S. Grayson, Commissioner and member of the Civil Service

Board thereof, Albert Hooper, Superintendent of Employment and

Secretary of the Civil Service Board thereof, and George E. Henon, Jr.,

General Superintendent thereof, alleging that he was unlawfully

deprived of his position as Superintendent of the Chicago Park

District and of his position as Superintendent of the Chicago Park

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and to pay him all wages which accrued from May 13, 1938, up to and including the date of his reinstatement, and that judgment be entered against the Chicago Park District for costs. This appeal followed.

Relator was born on April 17, 1893, and is married. On February 1, 1927, he became a chauffeur for the West Chicago Park Commissioners. On January 30, 1932, he made written application to the Civil Service Board of the West Chicago Park Commissioners for examination as a chauffeur. He passed the examination, was certified and appointed. The act known as the Chicago Park District Act (Par. 333.1, Ch. 105, Ill. Rev. Stat. 1939) approved July 10, 1933, authorized the creation of a park district for the supervision and operation of all parks, boulevards, ways and other public property then under the jurisdiction of any park districts in Chicago, the territory to comprise all of the city of Chicago and such territory located without the corporate limits "as may be included in any existing park district lying partly within and partly without" such limits. The act bore a referendum provision providing for its submission to the electors. It was adopted by the voters. Subsequently, the act was amended by disconnecting from the territory of the district all territory outside the corporate limits of the city. The Chicago Park District was organized and began functioning on May 1, 1934. Section 14 of the Chicago Park District Act (Par. 333.14, Ch. 105, Ill. Rev. Stat. 1939) provides that "'An act relating to the civil service in park systems' approved June 10, 1911, as amended, shall apply to the Chicago Park District, and upon the coming into effect of this act there shall be appointed but one superintendent of employment and but one civil service board for such district. Every officer and employee in the classified civil service at the time this act takes effect shall be assigned to a position having, so far as possible, duties equivalent to his former office or employment, and such officers and employees shall have the same standing, grade, and privilege which they respectively had in the districts from

which they were transferred, subject, however, to existing and future civil service laws. This section shall not be construed to require the retention of more officers and employees than are necessary to the proper performance of the functions of the Chicago Park District and the rules of the civil service board made in pursuance of the civil service law shall control in the making of layoffs and reinstatements of such officers and employees as are not necessary to be retained. * * * After the Chicago Park District came into existence, relator was from time to time employed as a temporary appointee under the title of chauffeur and was so employed until April 1, 1938. On May 13, 1938, he received notice that he was suspended, that thereafter he would be notified if charges were preferred; on May 13, 1938, and until September 6, 1938, he made demand after demand; on September 6, 1938, he received written notice of the charges. He was charged with (1) having a physical ailment or defect which incapacitated him for the performance of the duties of his position; (2) being guilty of a violation of a rule of the Civil Service Board in that he made a false statement in the application for the original entrance examination, and (3) that he made a false statement in writing to the head of his department. The specifications were as follows:

"Specifications under Charge 1. The said Claude E. Henderson occupies the position of Chauffeur in the classification of positions of the Chicago Park District, the duties of which require physical strength, experience and ability in the operation of vehicles driven by internal combustion motors, the operation of passenger automobiles, motor trucks, other vehicles, and the making of routine repairs or adjustments to such vehicles while on the road. The said Claude E. Henderson has lost the sight of one eye, as a result of which he is suffering from a physical defect which incapacitates him for the proper performance of the duties of his position, that is, the efficient operation of automobiles and motor trucks upon the streets and boulevards of the City, the performance of which duties require good eye sight and clear vision for the protection both of himself and of the public generally.

"Specifications under Charge 2: On the twenty-seventh (27th) day of June 1932 the said Claude E. Henderson executed in writing a written application for admission to the examination for the position of Chauffeur being the position in which he is now classified; that in response to the question contained in said written application, namely, 'Have you any defect of sight, hearing, speech, or limb?' the said Claude E. Henderson answered 'No'; that at the time of making said application and the answering of said question, the said Claude E. Henderson had a defect in his sight in that he had completely lost the sight of one eye; that at the time of the making of said application and the answering of said question, the

which they were transferred, subject, however, to the fact that the civil service law, this section shall not be construed to require the retention of more officers and employees than are necessary to the proper performance of the functions of the Chicago Police Department and the rules of the civil service board made in pursuance of the civil service law shall apply in the making of layoffs and reinstatement of such officers and employees as may be necessary to be retained. " " After the Chicago Police Department was reorganized under the title of sheriff and was so reorganized on April 1, 1938, on May 12, 1938, he received notice that he was suspended, that thereafter he would be notified if charges were preferred; on May 17, 1938, and until September 6, 1938, he was heard after demand; on September 6, 1938, he received written notice of the charges. He was charged with (1) having a physical ailment or defect which incapacitated him for the performance of the duties of his position; (2) being guilty of a violation of a rule of the Civil Service Board in that he made a false statement in the application for the original entrance examination; and (3) that he made a false statement in writing in the name of his department. "The specification as set forth follows:

"Specification of Charges: The applicant, in the application of his name to the position of Sheriff in the Chicago Police Department, which position is a position of trust, strength, experience and ability in the execution of various duties by internal combustion engine, the possession of necessary equipment, motor trucks, other vehicles, and the use of various weapons and munitions to such vehicles while in the service of the Chicago Police Department. Handerson has lost the right to the position of Sheriff in the Chicago Police Department from a physical defect which he has suffered from the proper performance of the duties of his position. The applicant's efficient operation of automobiles and motor trucks and the possession of a good eye sight and clear vision for the purpose of such duties and of the public generally.

"Specification of Charges: The applicant, in the application of his name to the position of Sheriff in the Chicago Police Department, which position is a position of trust, strength, experience and ability in the execution of various duties by internal combustion engine, the possession of necessary equipment, motor trucks, other vehicles, and the use of various weapons and munitions to such vehicles while in the service of the Chicago Police Department. Handerson has lost the right to the position of Sheriff in the Chicago Police Department from a physical defect which he has suffered from the proper performance of the duties of his position. The applicant's efficient operation of automobiles and motor trucks and the possession of a good eye sight and clear vision for the purpose of such duties and of the public generally.

said Claude R. Henderson knew that he had lost the sight of one eye and knowingly and falsely answered said question in the manner above set forth, with the intent and purpose of deceiving the Civil Service Board of the West Chicago Park Commissioners, to whom said application was made, and which said West Chicago Park Commissioners is the predecessor of the Chicago Park District.

"Specifications under Charge 3. The said Claude R. Henderson occupies the classification of Chauffeur in the classified service of the Chicago Park District. Immediately after coming into existence of the Chicago Park District in succession to the former park districts, including West Chicago Park Commissioners, a questionnaire known as a Duties Statement was submitted to all of the employees in the service of the Chicago Park District for the purpose of securing full information concerning the positions occupied by all persons in the service, the nature of the duties performed by them and other data deemed necessary for the records; that in response to the following question contained in said questionnaire, namely, 'Have you now any deformity, physical disability, amputation, or defect of sight or hearing?', the said Claude R. Henderson answered 'No'; that at the time of the making of said statement, the said Claude R. Henderson did have a defect in sight in that he had completely lost the sight of one eye; that at the time of the making of said statement, the said Claude R. Henderson knew that he had lost the sight of one eye and knowingly and with the intent to deceive his department head, made said false answer in said questionnaire in response to said request contained in said Duties Statement."

The charges were preferred against relator by Blaine Hoover, Superintendent of Employment and Secretary of the Civil Service Board.

Stephen D. Forst was the investigating officer. The hearing on the charges and specifications was held before Blaine Hoover, a member of the board, and Stephen D. Forst, an investigating officer. The Park District was represented by an attorney, as was the relator. The relator was also present in person. There was a full hearing on the charges. Witnesses were sworn and testified. In the trial there was testimony in relator's behalf that he was in good physical condition; that his vision was normal; that he had never had an accident; and that he had a good record as to character, sobriety and ability. After the hearing, relator was examined by Dr. Harry S. Gradle, an eye specialist, who reported the result of his examination to the Chicago Park District as follows:

"Right eye, vision - 20/20 Externally normal. Right visual field was normal in all respects. Dark adaptation normal. The lens is clear. Fundus normal. There is a minimum amount of hyperopic astigmatism. Normal reading glasses required because of age. Left eye removed in 1919 because of injury sustained in war. Socket is in good condition. He has developed good pseudo depth perception, perfect for distance, and fair at the near range, of 20 inches. His physical-mental reflexes are prompt and active. In view of the above findings I can recommend that this man is capable of acting as

chauffeur for ordinary pleasure cars and trucks. I do not think he would be a safe driver for high speed passenger buses. He comes under the designation of the American Medical Association Committee of 'individuals recommended for limited drivers license.'

It was brought out that relator uses an artificial eye, his left eye having been removed in 1919 because of an injury. Bernard C. Holoff, Director of the Employees Relations Division of the Chicago Park District, testified that relator was not competent to perform the duties of chauffeur; and that because of the loss of his left eye it would be necessary on many occasions for him to turn his head to the left in order to observe traffic approaching from that direction. The amended petition sets forth the findings of the investigating officer. He found him guilty of each charge. These findings are complete.

They are findings of fact. The findings concluded by directing that relator be discharged from the position of chauffeur and that his name be removed from the civil service list as a chauffeur and from the classified service of the Chicago Park District. The Civil Service Board approved and ratified the findings and the order, and directed that the order be enforced. Relator was given a copy of the findings and the decision. He then petitioned for a rehearing, which was denied.

The first point urged by defendants is that the writ of mandamus will not lie to review the proceedings of the Civil Service Board. Relator contends that the writ of mandamus will lie to review the proceedings of the Civil Service Board where it had no jurisdiction to conduct a hearing in the first instance. The parties are in agreement, therefore, that if the Board had jurisdiction and conducted a hearing in accordance with the law that the court does not have any power to review such proceedings by mandamus. The second point advanced by defendants is that the Civil Service Board is composed of administrative officers clothed with certain statutory powers from whose decision the law gives no right of appeal and no right to the courts to inquire into the discretion exercised by that body, provided it acted within its statutory powers. Relator agrees that the Civil Service Board is composed of administrative officers clothed with

chancellor for ordinary business and work. I do not think he would be a safe driver for high speed, however. It comes under the designation of the American Medical Association Committee of 'individuals recommended for limited driving licenses.'

It was brought out that after these two witnesses, his left eye having been removed in 1918 because of an injury. Arthur J. Nichols,

Director of the Highway Safety Division of the Chicago Police

District, testified that before he had received the report on

status of chauffeur; and that because of the fact of his left eye it

would be necessary on many occasions for him to turn his head to the

left in order to observe traffic approaching from that direction. The

amended petition sets forth the findings of the investigating officer.

He found his guilty of each charge. These findings are complete.

They are findings of fact. The findings concluded by stating that

refactor be discharged from the position of chauffeur and that his name

be removed from the civil service list as a chauffeur and from the

classified service of the Chicago Police District. This advice

being approved and signed by the findings of the fact, the board

that the order be enforced. Refactor was given a copy of the findings

and the decision. He then resigned for a resignation, which was signed.

The first point was by Refactor as to the findings of fact.

Refactor will not be to review the proceedings of the board.

Board. Refactor contended that the only evidence of his no limitation

the proceedings of the civil service board where it was no limitation

to conduct a hearing in the first instance, no limitation on the

board, therefore, that if the board had had jurisdiction in the

bearing in accordance with the law that the board was not to have

power to review such proceedings in review. The board

advanced by Refactor is that he will not be reviewed by the

administrative officer, which will be in the case of the board

whose decision the law gives no right of appeal and no right to the

courts to involve into the classification proceedings. The board

is acted within the statutory power. Refactor

service board is composed of administrative officers, Refactor

certain power, but insists that the law gives a remedy to one harmed by the wrongful exercise of those powers and that the courts may inquire into the discretion exercised by the Civil Service Board. Relator does not cite any authority to support his contention. We agree that the courts have no right to inquire into the discretion exercised by the Civil Service Board, provided it acts within its statutory powers.

Defendants next contend that the facts necessary to confer jurisdiction upon the Civil Service Board are shown by the official record and by the amended petition of relator; that the charges filed before the Board contained ample ground for his discharge, and that these charges, or any of them, constitute legal cause for his removal. Relator counters by maintaining that the charges filed against him contain no ample ground for his discharge and do not constitute legal cause for his removal. The record of the civil service commission shows on its face all the necessary jurisdictional facts: First, that the charges were filed; second, that notice was served together with a copy of the charges; third, that a trial was had and witnesses heard; and fourth; that relator was present and participated in the hearing. The court in the instant case was without power to weigh and determine the evidence. The charges fully informed the relator as to what he was to face. He was accorded a full hearing and produced witnesses in his behalf. He contends, however, that Blaine Hoover, Secretary of the Civil Service Board and also a member of the Board, acted as both accuser and judge, and that Stephen D. Forst was not qualified as an investigating officer, and that hence the hearing was prejudged and predetermined. The rules of the Board provide that "it shall be the duty of the Secretary of the Civil Service Board to file charges against any officer or employee in the classified service where the records of the Board show a prima facie case of cause for removal, discharge, demotion or suspension of such officer or employee." Mr. Hoover acted in his official capacity and not in his individual capacity. The Civil Service Board appointed Forst as investigating officer. The statute contemplates that the

certain power, but instead that the fact gives a remedy to one injured by the wrongful exercise of those powers and that the courts may interfere into the discretion exercised by the Civil Service Board, and that does not give any authority to the courts to interfere. The courts have no right to interfere into the discretion exercised by the Civil Service Board, provided it acts within its statutory powers. Defendants next contend that no legal remedy is available jurisdiction upon the Civil Service Board and that the charges filed record and by the amended petition of relation; that the charges filed before the board contained no legal ground for its discharge, and that these charges, or any of them, constituted legal cause for his removal. Relator counters by maintaining that the charges filed against him contain no legal ground for his discharge and do not constitute legal cause for his removal. The record of the Civil Service Commission shows on its face all the necessary jurisdictional facts: first, that the charges were filed; second, that notice was given to relator in due time of the charges; third, that a trial was had and a verdict rendered; and fourth, that relator was appointed and reappointed in the service. The court in the instant case was without jurisdiction to interfere and set aside the evidence. The charges fully informed the relator as to what he was to face. He was accorded a full hearing and proceeded without objection to deny the charges, however, that during the hearing, testimony of the Civil Service Board and also a number of the witnesses were introduced and Judge, and Chief Clerk of the Court, and that hence the hearing was regular and the verdict of the Board of the Board of the Civil Service Board is a matter of public record and is a matter of public record. The charges filed to file charges against the relator and the evidence in the classified service where the relator was employed a prima facie case of cause for removal. The relator was not an officer or employee, Mr. Hoover acted in the official capacity and not in his individual capacity. The relator was not an officer or employee. The relator was not an officer or employee. The relator was not an officer or employee.

Civil Service Board shall act upon the decision of the investigating officer. Relator did not allege any facts showing why Forst was not a qualified investigating officer, nor did he offer any evidence to show that the hearing was prejudged or predetermined. The record does not show that in entering its order sustaining the charges, the Civil Service Board acted in an arbitrary or unlawful manner. The Civil Service Commission is an administrative body and a wide latitude is given to it.

Defendants also maintain that the transcript of the testimony taken before the Civil Service Board was not a part of the official record of that Board and was not admissible in evidence. The trial judge insisted that the attorney for the Chicago Park District produce and deliver to him the transcript of the testimony taken at the hearing on the charges. This attorney objected and insisted that the transcript was not admissible and that the trial court was limited in its consideration of the case to the record alone. The trial judge read the transcript but did not rule as to whether he admitted it. Relator proceeded by way of a petition for mandamus rather than by a petition for a certiorari. Apparently, he proceeded on the theory that the Civil Service Commission had no jurisdiction to conduct the hearing. We have held that the record shows that the Civil Service Commission did have jurisdiction to conduct the hearing. Having jurisdiction to conduct the hearing, it follows that the discretion exercised by the Civil Service Commission cannot be reviewed by mandamus. However, in certiorari cases involving action of the Civil Service Commission, it has uniformly been held that it is not necessary to certify the evidence and that the trial court is limited in its consideration to the record alone. The court does not review the evidence.

Finally, defendants argue that the portion of the judgment order commanding the defendants to pay the relator wages from May 13, 1938, to the date of reinstatement, is erroneous. The trial court found that relator was not suspended but that he was laid off as a

Given to it.

Service Commission is an administrative body and its latitude in Service Board cases is an arbitrary or unlawful manner. The Civil not show that in entering its order it was acting in excess of its authority. The record does show that the hearing was prejudicially affected. The record does not show that in entering its order it was acting in excess of its authority. The Civil Service Board acted in an arbitrary or unlawful manner. The Civil Service Commission is an administrative body and its latitude in Service Board cases is an arbitrary or unlawful manner. The Civil Service Board acted in an arbitrary or unlawful manner. The Civil Service Commission is an administrative body and its latitude in Service Board cases is an arbitrary or unlawful manner.

[illegible]

temporary employee. In our opinion the record does not show any basis for that part of the judgment order commanding the payment of salary.

Because of the views expressed, the judgment of the Circuit Court of Cook County is reversed, the amended petition is dismissed, and judgment is entered here for the defendants and against the plaintiff for costs.

JUDGMENT REVERSED AND JUDGMENT HERE.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

temporary employee. In our opinion the record does not show any basis for that part of the judgment order commanding the payment of salary.

Because of the views expressed, the judgment of the Circuit Court of Cook County is reversed, the amended petition is dismissed, and judgment is entered here for the defendant and against the plaintiff for costs.

JUDGMENT OF THE COURT IN THIS CASE ENTERED AT CHICAGO, ILL.,

HERZEL, N. J. AND DENNIS V. NEW IV, L. COURT.

41579

JACK ITTIN,

Appellant,

APPEAL FROM

MUNICIPAL COURT

v.

MARTIN L. NATTENHEIMER,

Appellee.

OF CHICAGO.

310 I.A. 262

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On July 26, 1939, plaintiff filed a statement of claim in the Municipal Court of Chicago, which alleged that on February 1, 1939, plaintiff and defendant entered into a sealed written agreement, reading:

"That, Whereas, Jack Ittin is a stockholder of the Miracle Tip Company, a corporation organized and duly licensed to do business under the laws of the State of Illinois and has stock certificate #2, representing seventy-five shares of common stock of said corporation, and whereas the said Jack Ittin has an agreement with the Miracle Tip Company, a corporation, dated the 1st day of March, A. D., 1938, whereby the said Miracle Tip Company agreed to employ the said Jack Ittin and pay him for his services the sum of Thirty Five (\$35.00) Dollars per week, which agreement is for a period of one year.

"And, Whereas, Martin L. Nattenheimer is desirous of purchasing the stock of the said Jack Ittin in the said Miracle Tip Company, a corporation, he does agree with the said Jack Ittin to pay him for his seventy-five shares of stock in the Miracle Tip Company the sum of Eighteen Hundred (\$1800.00) Dollars on the following basis:

February 1, 1939	\$ 75.00
March 1, 1939	75.00
April 1, 1939	75.00
May 10, 1939	300.00
June 1, 1939	75.00
July 1, 1939	50.00
August 1, 1939	50.00
September 1, 1939	75.00
October 1, 1939	75.00
November 1, 1939	300.00
December 10, 1939	75.00
January 1, 1940	75.00
February 1, 1940	75.00
March 1, 1940	75.00
April 1, 1940	75.00
May 1, 1940	75.00
June 1, 1940	75.00
July 1, 1940	50.00
August 1, 1940	75.00

and the said Jack Ittin does agree to accept the sum of Eighteen Hundred (\$1800.00) Dollars in payment of his seventy-five shares of stock in the Miracle Tip Company, a corporation and he does further agree to cancel the contract entered into by and between himself and the Miracle Tip Company, a corporation, the 1st day of March, A. D. 1938, wherein the said Miracle Tip Company, a corporation employed him at the rate of Thirty Five (\$35.00) Dollars per week.

41575

JACK TITIN

Agonizans,

v.

Accellio.

NO. JUSTICE BURKE DELIVERED THE VERDICT.

On July 25, 1938, plaintiff filed a statement of claim in

the Municipal Court of Chicago, which alleged that on February 1, 1938,

plaintiff and defendant entered into a verbal agreement, reading:

"That, whereas, Jack Titin is a stockholder of the Miracle Tip Company, a corporation organized and duly licensed to do business under the laws of the State of Illinois and has stock certificates representing seventy-five shares of common stock of said corporation, and whereas the said Jack Titin has an agreement with the Miracle Tip Company, a corporation, dated the 1st day of March, A. D. 1938, whereby the said Miracle Tip Company agreed to employ the said Jack Titin and pay him for his services the sum of thirty-five (\$35.00) Dollars per week, which agreement is for a period of one year. And, whereas, Martin I. Weissenheimer is President of said company, and whereas the said Jack Titin in the said Miracle Tip Company, a corporation, he does agree with the said Jack Titin to pay him for his seventy-five shares of stock in the Miracle Tip Company the sum of eighteen hundred (\$1800.00) Dollars on the following basis:

February 1, 1938	75.00
March 1, 1938	75.00
April 1, 1938	75.00
May 1, 1938	75.00
June 1, 1938	75.00
July 1, 1938	75.00
August 1, 1938	75.00
September 1, 1938	75.00
October 1, 1938	75.00
November 1, 1938	75.00
December 1, 1938	75.00
January 1, 1939	75.00
February 1, 1939	75.00
March 1, 1939	75.00
April 1, 1939	75.00
May 1, 1939	75.00
June 1, 1939	75.00
July 1, 1939	75.00
August 1, 1939	75.00

and the said Jack Titin does agree to accept as full payment of his seventy-five shares of stock in the Miracle Tip Company, a corporation, on or before the 1st day of March, A. D. 1938, the sum of eighteen hundred (\$1800.00) Dollars, which sum he has agreed to cancel the contract entered into by him between the said Jack Titin and the Miracle Tip Company, a corporation, dated the 1st day of March, A. D. 1938, wherein the said Miracle Tip Company, a corporation, agreed to employ him at the rate of thirty-five (\$35.00) Dollars per week.

"It is further agreed by and between the parties hereto that the original of this agreement together with stock certificate #2, representing seventy-five shares of stock in the Miracle Tip Company, a corporation and the contract entered into between Jack Ittin and the Miracle Tip Company, a corporation dated March 1, 1938, shall be held in escrow by Max Richard Krause who shall upon receiving proof of the payment of Eighteen Hundred (\$1800.00) Dollars to Jack Ittin shall turn over to Martin L. Nattenheimer or his assigns the contract between Jack Ittin and the Miracle Tip Co., a corporation, marked cancelled and stock certificate #2, representing seventy-five shares of stock in the Miracle Tip Co., a corporation, which shall have been endorsed in blank by the said Jack Ittin; nothing herein contained shall be deemed to deprive Jack Ittin of his rights as a stockholder or director of said corporation during the pendency of this escrow.

"It is hereby further agreed that in the event of default of any of the above payments as set forth in paragraph two by Martin L. Nattenheimer, and said default continuing for two weeks, notice shall be given to the escrow agent, who in turn shall by registered mail give notice to Martin L. Nattenheimer of the default in payment and unless within two weeks of the giving of notice by registered mail such arrearage is paid, then Max Richard Krause shall upon demand of Jack Ittin turn over to the said Jack Ittin, the original of this agreement together with agreement dated March 1st, 1938 between Jack Ittin and the Miracle Tip Company, a corporation, and stock certificate #2, representing seventy-five shares of stock in the Miracle Tip Company, a corporation and it is further agreed by and between the parties that nothing in this contract in anywise prejudice the rights of Jack Ittin in the event of a default and the payments made upon this contract shall be considered as liquidated damages paid to Jack Ittin for the breach of this agreement by Martin L. Nattenheimer."

Plaintiff further alleged that under the agreement defendant paid \$75.00 on February 1st, 1939, \$75.00 on March 1st, 1939, \$75.00 on April 1st, 1939, and \$300.00 on May 10th, 1939, or a total of \$625.00, leaving a balance owing of \$1,275.00; that plaintiff frequently requested defendant to pay such balance, but defendant failed and refused so to do. Plaintiff prayed judgment for \$1,275.00. Defendant filed a motion to dismiss the cause. The court sustained this motion and entered judgment for costs against plaintiff, to review which this appeal is prosecuted.

The first point advanced by plaintiff is that the contract does not limit the remedy of plaintiff to retaining the money paid as liquidated damages; that the right to liquidated damages is an added, optional right, and that the contract expressly states that "nothing in this contract [shall] in anywise prejudice the rights of Jack Ittin in the event of default." Defendant replies that the contract limits

"It is hereby further agreed that in the event of default of any of the above payments as set forth in paragraph 1 of Martin L. Hoffenthaler, and said default continuing for a week, notice shall be given to the above agent, who is hereby authorized to mail five notices to Martin L. Hoffenthaler at the default in payment and unless within two weeks of the giving of notice by registered mail such arrangements are made, then default on aces shall mean demand of Jack Little turn over to the said Jack Little, the original of this agreement together with expenses of advertisement, and between Jack Little and the Mirvale Oil Company, a corporation, and stock certificate #5, representing seventy-five shares of stock in the Mirvale Oil Company, a corporation and is a further agreed by and between the parties that nothing in this contract is intended to prejudice the right of Jack Little in the event of a default in the payments made upon this contract shall be considered as liquidated damages paid to Jack Little for the breach of this agreement by Martin L. Hoffenthaler."

This appeal is unnecessary.

[illegible]

the remedy of plaintiff to the retention of the money paid by the defendant as and for his liquidated damages, and that the words that "nothing in this contract [shall] in anywise prejudice the rights of Jack Ittin in the event of default" does not enlarge the plaintiff's right so as to permit him to sue for damages; and that the quoted language refers to plaintiff's rights under his contract with the Miracle Tip Company. This was a contract for the sale of seventy-five shares of stock in the Miracle Tip Company for the sum of \$1,800.00. In addition to being a stockholder, plaintiff was a director in the corporation. He also had a contract of employment with the corporation, whereby the latter agreed to pay him \$35.00 a week for the period of one year. The employment contract was dated March 1, 1938, and would expire on March 1, 1939, or a month subsequent to the date on which the agreement sued on was executed. The agreement sued on, the employment agreement and the stock certificate for seventy-five shares of stock, endorsed in blank, were to be held by an escrowee, Max Richard Krause, who upon receiving proof of the payment of \$1,800.00 to plaintiff, was required to deliver to defendant the stock certificate and the employment contract. During the pendency of the escrow plaintiff was to retain all his rights as a stockholder and director. A careful reading of the contract shows that the parties contemplated that in the event of a default in making any of the payments, and the default continuing for two weeks, notice of such default should be given by plaintiff or his agent or assignee to the escrowee, who in turn should, by registered mail, give notice to defendant of the default, and that unless within two weeks of the giving of such notice the arrearage was paid, then the escrowee should upon demand of plaintiff turn over to plaintiff the agreement sued on, the employment agreement and the stock certificate, and that the payments should be considered as liquidated damages for the breach of the agreement by defendant. It is true that the parties also agreed that "nothing in this contract [shall] in anywise prejudice the rights of Jack Ittin in the event of a default". Plaintiff maintains that the last quoted language

the remedy of [illegible] the defendant [illegible] of the
defendant as and for the [illegible] [illegible] [illegible]
"nothing in this contract [illegible] in any [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
right so as to [illegible] [illegible] [illegible] [illegible] [illegible]
language refers to [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
shares of stock in the [illegible] [illegible] [illegible] [illegible] [illegible]
In addition to [illegible] [illegible] [illegible] [illegible] [illegible]
corporation. He also had a [illegible] [illegible] [illegible] [illegible] [illegible]
whereby the latter [illegible] [illegible] [illegible] [illegible] [illegible]
one year. The employment contract was dated [illegible] [illegible] [illegible]
expire on [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
agreement used on [illegible] [illegible] [illegible] [illegible] [illegible]
agreement and the stock certificate [illegible] [illegible] [illegible]
endorsed in blank, were [illegible] [illegible] [illegible] [illegible] [illegible]
who upon [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
was required to deliver [illegible] [illegible] [illegible] [illegible] [illegible]
employment [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
to retain [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
reading of the contract [illegible] [illegible] [illegible] [illegible] [illegible]
event of [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
plaintiff or his [illegible] [illegible] [illegible] [illegible] [illegible]
by [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
unless within two [illegible] [illegible] [illegible] [illegible] [illegible]
said, then [illegible] [illegible] [illegible] [illegible] [illegible]
plaintiff the agreement [illegible] [illegible] [illegible] [illegible] [illegible]
stock certificate, and [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
is from [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
of a [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

preserves the right of plaintiff to sue for the balance of the purchase price. It will be observed that this language is coupled with the language that "the payments made upon this contract shall be considered as liquidated damages". We agree with the defendant that the language that "nothing in this contract [shall] in anywise prejudice the rights of Jack Ittin in the event of a default" does not enlarge the plaintiff's right, and that it refers to his rights as a stockholder and director and as an employee under his contract with the corporation.

The second point urged by plaintiff is that under Section 63 of the Uniform Sales Act, (Chapter 121 $\frac{1}{2}$, Ill. Rev. Stat. 1939) he has a right to sue defendant for the balance of the purchase price. Defendant meets this contention by stating that the concurrent remedies afforded a seller under the provisions of the Sales Act can have no application to the instant case because the parties agreed in advance as to what the damages should be in the event of a default by the buyer. We agree with the position of defendant. Where a contract provides for liquidated damages and such provision is valid, it forms the measure of damages.

In drafting the contract the parties devoted the major part thereof to setting up machinery for the return of the stock certificate and the employment contract to plaintiff should defendant default in his payments. A careful reading of the contract convinces us that the parties contemplated that the provision for the return of the stock certificate and the retention of the payments made thereon as liquidated damages was intended by the parties to be the exclusive remedy of plaintiff in case of default.

The third point maintained by plaintiff is that the courts will construe contracts to carry out the intent of the parties; that it was not the intent of the parties that the defendant could relieve himself of liability by breaching the contract, and that defendant cannot set up his own failure to perform as a defense. The statement that courts will construe contracts to carry out the intent of the

preserves the right of plaintiff to sue for the balance of the purchase price. It will be observed that this language is couched with the language that "the payment made upon this contract shall be considered as liquidated damages". As there with the defendant that the language that "nothing in this contract [shall] in anywise constitute the promise of Jack Lutin in the event of a default" does not entitle the plaintiff's right, and that it refers to his rights as a stockholder and director and as an employee under his contract with the corporation.

The second point urged by plaintiff is that under Section 33 of the Uniform Sales Act, (Chapter 101, Ill. Rev. Stat. 1903) he has a right to sue defendant for the balance of the purchase price. Defendant meets this contention by stating that the payment made to plaintiff under the provisions of the Sales Act can have no application to the instant case because the parties entered in advance as to what the damages should be in the event of a default by the buyer. We agree with the position of defendant. Where a contract provides for liquidated damages and such provision is valid, it bars the measure of damages.

In drafting the contract the parties agreed the major part thereof to setting up machinery for the return of the stock certificate and the employment contract to plaintiff should default in delivery of his payment. A caveat on the day of the contract provided that the parties contemplated that the provision for the return of the stock certificate and the retention of the payment were intended as liquidated damages was intended by the parties in the event of a default of plaintiff in case of default.

The third point advanced by plaintiff is that the contract will constitute contracts to carry out the intent of the parties and it was not the intent of the parties that the contract should be intended of liability by breaching the contract, and the defendant cannot set up his own failure to perform as a defense. The defendant that courts will construe contracts to carry out the intent of the

parties is not challenged. In our discussion of the first point we concluded that the parties contemplated that in the event of default the clause relating to liquidated damages should govern their relations. Plaintiff does not contend that this clause is invalid. He does, however, contend that the contract does not contain any provision making the retaining of the payments as liquidated damages the sole remedy of plaintiff, and that the buyer cannot set up his own breach as a defense. Plaintiff argues that "the absurdity of defendant's contention is illustrated by the fact that if the buyer made no payments on account, the seller would have no rights since all he could do would be to retain the payments", and that if there were no payments there would be nothing to retain. It was contemplated that the defendant would pay \$75.00 on the day the contract was executed and the statement of claim shows that such payment was made. Plaintiff does not contend that this clause is invalid, in fact, he makes the contract a part of his statement of claim. Viewing the contract in retrospect, it appears that defendant has paid in \$25.00, which plaintiff retains. Plaintiff on demand may have his stock certificate and contract of employment. It appears to us that the provision as to liquidated damages is fair and equitable.

Finally, plaintiff insists that "if there was any doubt in the court's mind as to the meaning of a particular clause in the contract evidence should have been heard", and that "in no event was the lower court warranted, as a matter of law, in dismissing the cause on the pleadings." Under this point plaintiff states that there is nothing on the face of the statement of claim to show whether plaintiff elected to retain the payments as liquidated damages or to refund the same, and that if the defendant has any defense he should file an answer setting up such defense. It is, of course, fundamental that the motion to dismiss admits all facts well pleaded. In our opinion the court was right in deciding the case on the pleadings. The statement of claim avers the contract and shows payments by defendant aggregating

parties is not challenged. In our discussion of the first point we concluded that the parties contemplated that in the event of default the clause relating to liquidated damages should govern their relations. Plaintiff does not contend that this clause is invalid. He does, however, contend that the contract does not contain any provision making the retaining of the payments as liquidated damages the sole remedy of plaintiff, and that the buyer cannot get on his own breach as a defense. Plaintiff argues that the averment of defendant's contention is illustrated by the fact that if the buyer made no payments on account, the seller would have no remedy since all he could do would be to retain the payments, and that if there were no payments there would be nothing to retain. It was contemplated that the defendant would pay \$75.00 on the day the contract was executed and the statement of claim shows that such payment was made. Plaintiff does not contend that this clause is invalid, in fact, he argues that contract a part of his statement of claim. Viewing the contract in retrospect, it appears that defendant has paid in \$75.00, which plaintiff still retains. Plaintiff on demand may have his stock certificates and contract of employment. It appears to me that the provision as to liquidated damages is fair and reasonable. Finally, plaintiff insists that if there was any doubt as to the court's mind as to the meaning of a liquidation clause in the contract evidence should have been heard, but in no event was the lower court warranted, as a matter of fact, in disregarding the clause on the pleadings. Under this view, plaintiff is not to be faulted for nothing on the face of the statement of claim is shown to be true. Plaintiff elected to retain the payments as liquidated damages and he was not to be faulted for, and that if the defendant see any defect in the contract as to setting up such defense. It is, of course, the plaintiff's duty to motion to dismiss which will be granted. In the present case the court was right in deciding the case on the pleadings. The statement of claim avers the contract and shows payments by defendant and nothing

the sum of \$525.00, the last of which was made on May 10, 1939. At the time plaintiff's action was filed defendant was in default in making the payments due on June 1, 1939 and July 1, 1939. It is obvious from the statement of claim that plaintiff is suing for the balance of the purchase price, as he claims damages of \$1,275.00. Manifestly, plaintiff is disregarding the "liquidated damages" clause of the contract, and is suing, as he argues in his brief, under the provisions of Section 63 of the Uniform Sales Act. Plaintiff's statement that there is nothing on the face of the statement of claim to show whether he elected to retain the payments as liquidated damages or to refund the same, is vulnerable. He certainly does not elect to retain the payments as liquidated damages because he is suing for the balance. The statement of claim shows clearly that he is not relying on the liquidated damages clause. Plaintiff also suggests that the only time that he has a right to retain payments as liquidated damages is when there is a default and he, at his option, follows a certain prescribed procedure. It is true that plaintiff did not follow the procedure outlined in the contract. The contract provides that when a default occurs in the making of the payments and such default continues for two weeks, plaintiff "shall" give notice to the escrow agent, who "shall" notify defendant by registered mail, and that in the event of failure by defendant to make the delinquent payments within two weeks of such notice, the escrowee "shall" upon demand of plaintiff turn over the documents heretofore mentioned to plaintiff. We have held that the "liquidated damages" clause is binding upon the plaintiff as his only remedy in the event of default. The statement of claim shows that a default occurred. Hence, on the face of the statement of claim, the facts so pleaded being admitted by defendant, plaintiff has a right to demand that the escrowee "shall" notify defendant of the default, which would set in motion the procedure outlined in the contract whereby plaintiff would have the right to the return of the certificate of stock, the employment agreement and the agreement on which the action is based. We are of the opinion that the statement of claim does not show that plaintiff has a cause of action, and for that reason the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

of Chicago is affirmed. JUDGE: The court is of the opinion that the statement of claim does not show that the defendant is liable for the sum of \$523.00, the last of which was paid on May 1, 1935. At the time plaintiff's action was filed defendant was in default in making the payments due on June 1, 1935 and July 1, 1935. It is obvious from the statement of claim that plaintiff is suing for the balance of the purchase price, as he claims damages of \$1,575.00. Plaintiff, however, is disregarding the "liquidated damages" clause of the contract, and is suing, as he argues in his brief, under the provisions of section 65 of the Uniform Sales Act. Plaintiff's argument that there is nothing on the face of the statement of claim to show whether he elected to retain the payments as liquidated damages or to bring the suit, is untenable. He certainly does not elect to retain the payments as liquidated damages because he is suing for the balance. The statement of claim shows clearly that he is not relying on the liquidated damages clause. Plaintiff also suggests that the only time that he has a right to retain payments as liquidated damages is when there is a default and he, at his option, follows a certain prescribed procedure. It is true that plaintiff did not follow the procedure outlined in the contract. The contract provides that when a default occurs in the making of the payments and such default continues for two weeks, plaintiff shall give notice to the other party, who "shall" notify defendant by registered mail, and then in the event of failure by defendant to make the delinquent payments within two weeks of such notice, the recoverer "shall" upon demand of plaintiff turn over the documents heretofore mentioned to plaintiff. It does not appear that plaintiff is claiming damages in the event of a default. The statement of claim shows that a default occurred. Hence, on the face of the statement of claim, the fact so pleaded being admitted by defendant, plaintiff is entitled to recover that the recoverer "shall" notify defendant of the default, which would not in itself entitle plaintiff to the recovery of the balance of the purchase price. Plaintiff has the right to the return of the certificate of title, the agreement and the agreement on which the action is based. It is the court's opinion that the statement of claim does not show that plaintiff is liable for the sum of \$523.00, and for that reason the judgment of the court is affirmed.

41266

F. GERALD THOMAS,

Appellant,

v.

BENJAMIN MELMED,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

310 KA. 262²

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff F. Gerald Thomas brings this appeal from an order entered in the Municipal Court on November 17, 1939, vacating a judgment which had been entered on September 11, 1939, in favor of plaintiff and against defendant for the sum of \$6,500.00. Said order was entered on defendant's amended petition to vacate judgment by default.

Plaintiff contends that the trial court erred in vacating the judgment of September 11, 1939; that upon the running of thirty days from entry thereof, the trial court was without jurisdiction to vacate the judgment except on and under a sufficient statutory substitute for the writ of error coram nobis or a sufficient bill of review; that defendant's amended petition to vacate judgment was neither of these, and showed no good defense on the merits to plaintiff's claim; that defendant was guilty of gross negligence and laches in the premises, and "the whole proceedings ultimating in the order appealed from were but ill-conceived attempt of defendant's counsel to cloak their patent negligence by driving plaintiff into a disadvantageous settlement of his judgment against defendant."

Plaintiff further contends, in setting forth the errors relied upon, that on and after November 1, 1939, the date of filing of defendant's original petition to vacate, the trial court was without jurisdiction to vacate or set aside the judgment of September 11, 1939, on or under defendant's amended petition to vacate; that the trial court erroneously held it had such jurisdiction, erroneously held the amended petition sufficient, erroneously held defendant not

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31014-202

MR. JUSTICE DEWITT, ATTORNEY GENERAL, NEW YORK

Re: Defendant's Motion for Judgment of Acquittal
 The Court has considered the motion and the evidence presented in the case. The Court finds that the evidence is insufficient to sustain a conviction against the defendant. The Court therefore grants the motion and enters judgment of acquittal for the defendant.

The Court further finds that the defendant is entitled to a new trial. The Court therefore grants the motion for a new trial. The Court will set aside its previous judgment and enter a new judgment of conviction for the defendant. The Court will also award costs to the defendant.

barred of relief for his negligence, erroneously entered the order, or so much of the order of November 17, 1939, as vacated the judgment of September 11, 1939, erroneously sustained defendant's petition, or motion, to vacate judgment, and erroneously vacated plaintiff's judgment of September 11, 1939.

In setting forth his contentions or theory of the case, defendant states as follows:

1. That a default judgment for want of affidavit of merits should not have been entered when the defendant's motion to strike, which in the alternative is in the nature of an affidavit of defense or demurrer, remained undisposed of and pending of record.
2. That the motion on the petition and amended petition for the vacation of the ex parte judgment was sufficient under Section 21 of the Municipal Court Act and Rule 209 of the Chicago Municipal Court Rules to give the court jurisdiction to vacate the judgment.
3. That error, if any, of the court in annulling the default judgment was waived by the plaintiff when he moved and obtained leave to file, and filed, an amended statement of claim.
4. That error, if any, or lack of jurisdiction of the court to vacate the default judgment after the expiration of term time was waived and jurisdiction supplied when the plaintiff proceeded and participated in the trial on the merits.

Without going into a lengthy discussion relative to the situation presented for our consideration, the facts are substantially as follows:

Plaintiff filed a complaint in the Municipal Court, had a summons served and then on his motion the court entered a default judgment in favor of plaintiff and against defendant for \$6,500.00; that afterwards on motion of defendant, the trial court finding that it had made a mistake, vacated the judgment, sustained the motion of defendant to strike; permitted the plaintiff to file an amended

parted of relief for his negligence, erroneously entered the order, or so much of the order of November 17, 1935, as vacated the judgment of September 11, 1935, erroneously sustained defendant's motion, or motion, to vacate judgment, and erroneously vacated plaintiff's judgment of September 11, 1935.

In setting forth his contentions or theory of the

case, defendant states as follows:

1. That a default judgment for want of affidavit of defense should not have been entered when the defendant's motion to strike, which in the alternative is in the nature of an affidavit of defense or demurrer, remained undisposed of and pending of record.
2. That the motion on the petition and amended petition for the vacation of the ex parte judgment as null and void under section 21 of the Municipal Court Act and Rule 109 of the Chicago Municipal Court Rules to give the court jurisdiction to vacate the judgment.
3. That error, if any, of the court in annulling the default judgment was waived by the plaintiff when he moved and obtained leave to file, and filed, an amended statement of claim.
4. That error, if any, or lack of jurisdiction of the court to vacate the default judgment after the expiration of three years was waived and jurisdiction was lost when the plaintiff proceeded and participated in the trial on the merits.

Without going into a lengthy discussion relative to the situation presented for our consideration, the facts are substantially as follows:

Plaintiff filed a complaint in the Municipal Court, and summons served and then on his motion the court set for a default judgment in favor of plaintiff and against defendant for \$5,000.00. That afterwards on motion of defendant, the trial court finding that it had made a mistake, vacated the judgment, entered the motion to defendant to strike; permitted the plaintiff to file an amended

complaint and ordered the defendant to answer, which placed the cause at issue and thereafter proceeded to try the cause on its merits. Both parties waived a trial before a jury, after a jury of six men had been demanded. On a hearing of the merits before the court a finding was made for the defendant. The subsequent hearing on the merits of the case was not called to the attention of the court by plaintiff and this court is now asked to review the ruling on a previous motion in regard to the pleadings made several months prior thereto. This cannot be permitted.

In Acorn Lumber Co. v. Friedlander Box Co., 240 Ill. App. 425, the court at pages 426 and 427, said:

" * * * where a judgment is entered either in a suit in equity or an action at law, and the judgment is subsequently set aside and the cause then heard, both parties participating in the hearing, such participation waives the question of the right of the court to vacate the judgment."

In National Lead Co. v. Mortell, 261 Ill. App. 332, the court at page 335, said:

"After the ex parte judgment had been vacated appellant participated in the second trial. The jury's verdict was in favor of appellee and appellant sought and obtained a new trial. The court had jurisdiction of the subject matter of the action, and appellant by its voluntary and unlimited appearance in these proceedings after the order of May 12, 1923, subjected its person to the court's jurisdiction. Under these circumstances it waived the right to complain of the order vacating the ex parte judgment. Weisguth v. Supreme Tribe of Ben Hur, 272 Ill. 541; Grand Pacific Hotel Co. v. Pinkerton, 217 id. 61; Herrington v. McCollum, 73 id. 476." See also Central Bond Co. v. Roesser, 323 Ill. 90, 97.

In Peters v. Darling, 107 Ill. App. 301, counsel waived irregularities by submitting to the jurisdiction of the court and then proceeded to raise them on appeal. The court at page 305, said:

"It would be trifling with the courts and with the rights of parties to permit suitors, after voluntarily appearing and going to trial, to avail themselves of objections to the preliminary proceedings by which the cause or the parties were in court. (Randolph Co. v. Halls, 18 Ill. 29.)"

In the instant case, even if it were permissible to try a case on its merits and then later complain as to the pleadings and the jurisdiction of the court, the appeal comes to this court too late as it was not filed within the statutory period.

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"The hearing, such participation within the question of the right of the court to vacate the judgment."

CONFIDENTIAL

[illegible][illegible]

the appellant was not a defendant in the case and was not a party to the proceedings. The appellant was not a party to the proceedings and was not a defendant in the case. The appellant was not a party to the proceedings and was not a defendant in the case.

We think any criticism or objections which might have been made to the action taken by the trial court on the pleadings prior to the hearing on the merits, were waived by the subsequent trial and the said plaintiff is now estopped from questioning the rulings made by the trial court on the preliminary motions. No complaint is made in this court as to the findings and decision of the trial court in the trial on the merits of the cause, and on that branch of the case the appellant apparently is satisfied and we can find no reason to disturb the same. The order of the Municipal Court appealed from is, therefore, affirmed.

ORDER AFFIRMED.

HEBEL, P.J. AND BURKE, J. CONCUR.

we think any criticism or objection which might have been made to the action taken by the trial court in this instance prior to the hearing on the merits, were waived by the subsequent trial and the said plaintiff is now estopped from questioning the rulings made by the trial court in the preliminary motions. It is manifestly made in this court as to the finding and decision of the trial court in the trial on the merits, and in this branch of the case the applicant is estopped and we can find no reason to disturb the same. For want of the material facts appealed from is, therefore, dismissed.

ORDER AS ABOVE.

RECORDED, P. J. AND SHERIFF, J. C. WILSON.

41478

310 L.A. 263¹

NORTHERN TRUST COMPANY, Trustee under the will
of Daniel Burkhardtmeier, deceased, and
HARRY MANASTER & BROTHER, a corporation,

APPEAL FROM

Appellees

CIRCUIT COURT

EDWARD L. WATSON,

Appellant.

COOK COUNTY.

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

Defendant Edward L. Watson brings this appeal from a

judgment entered non obstante veredicto in the Circuit Court in favor of plaintiffs in a forcible entry and detainer suit for the possession of a farm consisting of 180 acres located in the southern part of Cook County, Illinois, occupied by defendant's family, as tenants. Suit was originally commenced before a justice of the peace who found that defendant was unlawfully withholding from the plaintiffs possession of said farm.

Plaintiffs, by their attorneys, made a motion for a judgment notwithstanding the verdict of the jury which the court sustained and entered an order and judgment to the effect that the plaintiffs have and recover from the defendant Edward L. Watson, possession of the entire farm and lands aforesaid.

It appears that a written lease was entered into between Daniel Burkhardtmeier and Edward L. Watson in February, 1938, the term of said lease extending from March 1, 1938 until March 1, 1939, at a rental of \$60.00 a month.

It further appears that defendant was permitted to hold over beyond the term of the lease under a verbal agreement, and on August 18, 1939, entered into a similar verbal agreement for operation of the farm crop year 1940, and ending March 1, 1941. Pursuant to that agreement defendant did his fall plowing, sowed winter wheat and put in fertilizer at great expense getting ready for the following season. Defendant also dealt with a man named Christ Burkhardtmeier,

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41478

NORTHERN TRUST COMPANY, Plaintiff, vs. HARRY HANSEN & SONS, INC., Defendant.

Defendant

EDWARD L. HANSEN

Appellant

MR. JUSTICE DENIS L. HANSEN, Chief Justice of the Court

Defendant Edward L. Hansen brings this appeal from a judgment entered non obstante veredicto in the Circuit Court in favor of plaintiffs in a forcible entry and detainer suit for the possession of a farm consisting of 160 acres located in the northern part of Cook County, Illinois, occupied by defendant's family, as tenants. Suit was originally commenced before a Justice of the Peace who found that defendant was unlawfully withholding from the plaintiffs possession of said farm.

Plaintiffs, by their attorneys, made a motion for a judgment notwithstanding the verdict of the jury which the court sustained and entered an order and judgment to the effect that the plaintiffs have and recover from the defendant Edward L. Hansen, possession of the entire farm and lands thereon. It appears that a written lease was entered into between Daniel Hansen and Edward L. Hansen in February, 1935, the term of said lease extending from March 1, 1935 until March 1, 1936, at a rental of \$3.00 a month.

It further appears that a defendant was permitted to hold over beyond the term of the lease under a verbal agreement, and on August 16, 1936, entered into a written verbal agreement with the plaintiffs of the farm from year 1940, and ending March 1, 1941, provided that agreement defendant did his fall plowing, sowed winter wheat and put in fertilizer at proper seasons during the fall and winter season. Defendant also dealt with a number of other matters.

or his representative, and paid the rent for the farm, being \$60 each month, to him. Burkhartsmeier, the owner of the farm, died in February, 1939, but the rent for said farm was always sent to his office which was also occupied by his nephew Christ Burkhartsmeier.

It further appears that the latter part of February, 1940, defendant was informed by a representative of the Northern Trust Company that said company would be handling the affairs of the farm; that the County contemplated extending Vollmer Road and wanted a portion of said farm for a right-of-way, but plaintiffs are not merely seeking possession of the strip of land needed for that purpose, but want possession of the entire farm. Defendant received the following so called 60 day notice by registered mail:

"Chicago, Illinois
December 7, 1939

Mr. Edward L. Watson
Matteson, Illinois

Dear Sir:

Your lease of the farm now occupied by you expired March 1, 1939, and you were permitted to hold over for an additional year at the same rental as under the terms of the old lease. Therefore, your right of occupancy will expire on March 1, 1940.

As you perhaps know, this farm was owned as tenants in common by the late Daniel Burkhartsmeier, and Harry Manaster & Bro.

This is to advise you that this lease will not be further extended and you must surrender possession on or before March 1, 1940.

If you desire to rent any of the farm land without the buildings, we will be glad to take the matter up with you and, if we can arrive at terms mutually satisfactory, give you a lease in writing, but any such lease will not include the buildings or a strip of land one hundred feet wide lying fifty feet on either side of the section line between Sections 11 and 14.

We send you this notice as Trustee under the Last will and Testament of Daniel Burkhartsmeier, Deceased, and Harry Manaster and Bro., co-owners.

Very truly yours,
THE NORTHERN TRUST COMPANY as
Trustee as aforesaid
By C. W. COLWELL (Sgd.)
Assistant Secretary
and
HARRY MANASTER & BRO.
By Harry Manaster (Sgd.)"

on his representative, and said the rent for the farm, being 100 bushels
month, to him. Burkhartmaster, the owner of the farm, died in
February, 1938, but the rent for said farm was always paid to him
office which was also occupied by his nephew Orval Burkhartmaster.
It further says that the latter act of January, 1940,
defendant was informed by a representative of the Northern Trust
Company that said company would be handling the estate of the farm;
that the County contemplated extending Volmer and said estate a
portion of said farm for a right-of-way, and said estate are not merely
seeking possession of the strip of land needed for that purpose, but
want possession of the entire farm. Defendant received the following
as called 60 day notice by registered mail:

Chicago, Illinois
September 7, 1938

Mr. Edward J. Watson
Watson, Illinois

Dear Sir:

Your lease of the farm now occupied by you expired March
1, 1938, and you were permitted to hold over for an additional
year at the same rental as under the terms of the old lease.
Therefore, your right of occupancy will expire on March 1, 1940.
As you perhaps know, this farm was owned as tenants in
common by the late Daniel Burkhartmaster, and Harry Master and Mrs.
This is to advise you that this lease will not be further
extended and you must surrender possession on or before March 1, 1940.
If you desire to rent any of the farm land during the
buildings, we will be glad to take the farm as with you land, if
we can arrive at terms mutually satisfactory, give you a lease
in writing, but any such lease will not include the buildings or
a strip of land one hundred feet wide lying between the buildings on
side of the section line between Sections 11 and 12.
We send you this notice as tenants under the last will
and Testament of Daniel Burkhartmaster, deceased, and Harry
Master and Mrs., co-owners.

Very truly yours,
THE NORTHERN TRUST COMPANY
Trustees of the estate
By C. L. Hill (att'y)
Resident Secretary
and
HARRY MASTER and MRS.
By Harry Master (att'y)

The foregoing notice purports that the property belongs to several people. The notice is signed by The Northern Trust Company as trustee as aforesaid, by C. W. Colwell, Assistant Secretary and Harry Manaster & Bro., by Harry Manaster.

This suit was instituted by Harry Manaster & Brother, a corporation. The signature on the notice read, Harry Manaster & Bro., by Harry Manaster. Apparently there are two different legal entities, one appears to be a partnership and the other a corporation. The so-called notice was introduced in evidence over the objection of the defendant, which was error.

On the question as to whether the purported notice was properly served, the following is set forth in Ill. Rev. Stats. 1939, Chap. 80, Par. 10. Sec. 10:

"10. SERVICE OF DEMAND OR NOTICE.) § 10. Any demand may be made or notice served by delivering a written or printed, or partly written and printed, copy thereof to the tenant, or by leaving the same with some person above the age of ten years, residing on or in possession of the premises; and in case no one is in the actual possession of said premises, then by posting the same on the premises."

Nothing is said in the section which we have quoted about service of notice by mail.

In Barbee v. Evans, 220 Ill. App. 154, the court at page 158, said:

"Assuming that Barbee's letter to Evans, dated February 14, 1919, was actually received by Evans 60 days prior to April 30, 1919, and further assuming that it was a sufficient notice, in writing, as to its form and substance, under section 5 of the Landlord and Tenant Act, to terminate Evans' tenancy from year to year, it was not served on Evans in the manner provided by section 10 of said Act."

No evidence was offered showing that Harry Manaster & Brother either as a corporation or a partnership was entitled to possession of the premises, or that The Northern Trust Company was so entitled.

The notice in substance is incomplete. Assuming for the moment that defendant attempted to comply with plaintiffs' command, to whom should possession be delivered? It has been many times held that the person or persons instituting forcible entry and detainer

proceedings must show by the evidence, a right to the possession in himself or itself, and cannot rely upon the lack of right to possession in the defendant. McIlwain v. Karstens, 152 Ill. 135; Fitzgerald v. Quinn, 165 Ill. 354; Ladd v. Ladd, 168 Ill. App. 302; Layzod v. Martin, 305 Ill. App. 1.

It is further claimed that the agreement was contrary to the statute of frauds because it related to real estate and the period was for over a year. The answer to this is that there was part performance of this agreement by defendant having planted 70 acres of winter wheat to mature the succeeding year, hauling 200 loads of manure and having done 50 acres of fall plowing. The mere fact that this verbal agreement was entered into on August 18, 1939, to begin March 1, 1940 and to continue until March 1, 1941, does not invalidate the oral lease as being contrary to the statute of frauds.

In the case of Anderson v. Collinson, 300 Ill. App. 22, the court at page 26, said:

"Plowing and sowing small grain was enough to justify the conclusions reached by the court, that the part performance was sufficient to avoid and bar the Statutes. * * *

In this case, it is undisputed, that the plaintiff in the fall of 1937, purchased rye for seeding and sowed 15 acres on the leased premises, and that he plowed 20 acres. These facts tend to support his contention there was a verbal agreement to lease the farm for the ensuing year, and this work was done as part performance of the contract."

Chapter 57, Sec. 3, Ill. Rev. Stats. 1939, on Forcible Entry and Retainer, sets forth the following form to be followed in making a demand for possession of the premises:

"To
I hereby demand immediate possession of the following described premises: (describing the same.)
Which demand shall be signed by the person claiming such possession, his agent, or attorney."

It will be noted that the notice in the instant case is not signed by any one purporting to be the agent or the attorney. We believe after reviewing this evidence that no sufficient notice was given for possession, nor was the service or demand made in compliance with the provisions of the statute. The proof is lacking as to the right

proceedings must show by the evidence, a right to the possession in himself or herself, and cannot rely upon the lack of right to possession in the defendant. Williams v. Williams, 125 Ill. 155; Williams v. Quinn, 125 Ill. 155; Williams v. Quinn, 125 Ill. 155; Williams v. Quinn, 125 Ill. 155; Williams v. Quinn, 125 Ill. 155.

It is further claimed that the agreement of the company to the statute of Illinois because it related to real estate and the period was for over a year. The answer to this is that there was part performance of this agreement by defendant having planted 70 acres of winter wheat to winter the succeeding year, having 800 loads of manure and having done 50 acres of fall plowing. The facts that this verbal agreement was entered into on August 12, 1932, to begin March 1, 1940 and to continue until March 1, 1941, does not invalidate the oral contract as being contrary to the statute of Illinois. In the case of Williams v. Williams, 125 Ill. App. 2d, the court at page 28, said:

"...and owing itself again as enough to justify the conclusion reached by the court, that the part performance was sufficient to avoid the Statute. In this case, it is undisputed, that the plaintiff in the fall of 1937, purchased the 70 acres and sowed 10 acres on the leased premises, and that he plowed 50 acres. These facts tend to support his contention that there was a verbal agreement to lease the farm for the ensuing year, and this work was done as part performance of the contract."

Chapter 57, sec. 2, Ill. Rev. Stat. 1935, on forcible entry and detainer, sets forth the following form to be followed in making a demand for possession of the premises:

"To . . .
I hereby demand immediate possession of the following described premises: (describing the same).
Which demand shall be signed by the person claiming such possession, his agent, or attorney."

It will be noted that the notice in the instant case is not signed by any one purporting to be the agent of the company, and believe after reviewing this evidence that no sufficient notice was given for possession, nor was the service of demand made in compliance with the provisions of the statute. The proof is lacking as to the right

of possession in the plaintiff or plaintiffs. This case is one which should have been passed upon by a jury and the trial court erred in setting aside the verdict of the jury in favor of defendant and in entering a judgment non obstante veredicto.

No motion for a new trial was made in the trial court by either party, and consequently the primary question for this court to determine is what, if any, error was made. We believe the trial court erred in setting aside the verdict of the jury and entering a judgment non obstante veredicto, and for that and other reasons herein given the judgment of the Circuit Court is reversed and the cause is remanded with directions to vacate the order setting aside the verdict of the jury and to enter judgment pursuant to said verdict, thereby entering judgment in favor of defendant and against plaintiffs.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

HEBEL, P.J. CONCURS;

BURKE, J. SPECIALLY CONCURRING:

I am of the opinion that under Section 10 of the Landlord and Tenant Act, (Sec. 10, Ch. 80, Ill. Rev. Stat. 1939) service of the demand or notice may be made by mail. It is true that where notice is attempted to be served by mail and the party alleged to have been served denies having received the notice, that great difficulty would be encountered in making proof of service. However, this would involve a decision on a question of fact, the same as in any other disputed point of fact that arises in a law suit. It does not affect the right to make proof of service by mail. The case cited by each of the parties, Barbee v. Evans, 200 Ill. App. 154, does not support either contention. All that case decides is that whether or not the notice by mail was served in due time, presented a question of fact for the jury. It will be observed that the section provides that "any demand may be made or notice served by delivering a written or printed, or partly written and printed, copy thereof to the tenant, or by leaving the same with some person above the age of ten years, residing

of possession in the plaintiff or defendant. This case is one which should have been passed upon by a jury and the trial court erred in setting aside the verdict of the jury in favor of defendant and in entering a judgment non obstante veredicto.

No motion for a new trial was made in the trial court by either party, and consequently the primary question for this court to determine is what, if any, error was done. It is believed the trial court erred in setting aside the verdict of the jury and entering a judgment non obstante veredicto, and for that and other reasons herein given the judgment of the Circuit Court is reversed and the cause is remanded with directions to vacate the order setting aside the verdict of the jury and to enter judgment pursuant to said verdict, thereby setting judgment in favor of defendant and against plaintiff.

WITNESSED my hand and seal
this 1st day of May, 1917.

HERBELL, C. J. CONCURS;

BURKE, J. SPECIALLY CONCURS.

I am of the opinion that under Section 10 of the Landlord and Tenant Act, (Sec. 10, Ch. 80, Ill. Rev. Stat. 1907) notice of the demand or notice may be made by mail. It is true that where notice is attempted to be served by mail on the party alleged to have been served notice having received the notice, that such difficulty would be encountered in making proof of service. However, this would involve a decision on a question of fact, and as in any case a disputed point of fact that this is a fact. It is not the right to make proof of a notice by mail. The case cited by the court, Thompson v. Thompson, 103 Ill. App. 1st, 1904, is not the case either contention. All that case settles is that a notice by mail notice by mail was served in due time, presented a question of fact for the jury. It will be observed that the court in Thompson v. Thompson demand may be made or notice served by mail. It is not the right to make proof of a notice by mail, copy there of to the tenant, or by leaving the same with some person above the age of 18 years, or by

on or in possession of the premises; and in case no one is in the actual possession of said premises, then by posting the same on the premises." This language does not exclude other methods of serving the notice. In the case at bar the defendant does not deny that the notice was served in due time. In fact, he acknowledged the receipt of the notice in apt time. He merely contends that the notice, to be effective in law, must be served in the manner set out in the statute.

In this court the defendant alleges that there was no evidence that Harry Manaster and Bro., a corporation one of the plaintiffs had any right to the possession of the farm or any part thereof. An examination of the record discloses that this point was not raised in the trial court. The defendant tried the case on a different theory in the trial court. Hence, he should not be permitted to raise it in this court.

I agree with the opinion of the court that a question of fact was presented which was properly submitted to the jury and that the trial judge was in error in entering a judgment for the defendant and against the plaintiff notwithstanding the verdict. In my opinion the court should have entered judgment on the verdict. The agreement which defendant asserted was entered into, that he be allowed possession of the land until March 1, 1941, was not in writing, nor was any memorandum thereof reduced to writing and signed by the party to be charged therewith. The lease, according to the defendant, was to continue a year and to commence some months in the future. Under the oral agreement for the extension of the tenancy until March 1, 1941, defendant planted 70 acres in winter wheat, hauled 200 loads of manure and did 50 acres of fall plowing. This clearly was a part performance. If the tenancy which he contends was agreed upon is not recognized, then he will suffer the loss of the crops planted and all the fruits of his labors. Plaintiff contends, however, that in an action at law, part performance of a contract made in violation of the statute of frauds, does not take the contract out of the statute and will not operate as an estoppel, but a

on or in possession of the premises; and in case no one is in the actual possession of said premises, then by posting the same on the premises. This language does not exclude other methods of serving the notice. In the case at bar the defendant does not deny that the notice was served in due time. In fact, he acknowledged the receipt of the notice in due time. He merely contends that the notice, to be effective in law, must be served in the manner set out in the statute.

In this court the defendant alleges that there was no evidence that Harry Manchester and Co., a corporation one of the plaintiffs had any right to the possession of the farm or any part thereof. An examination of the record discloses that this point was not raised in the trial court. The defendant tried the case on a different theory in the trial court. Hence, he should not be permitted to raise it in this court. I agree with the opinion of the court that a question of fact

was presented which was properly submitted to the jury and that the trial judge was in error in entering a judgment for the defendant and against the plaintiff notwithstanding the verdict. In my opinion the court should have entered judgment on the verdict. The agreement which defendant asserted was entered into, that he should have a portion of the land until March 1, 1911, was not in writing, nor was any memorandum thereof reduced to writing and stated by the party to be charged therewith.

The lease, according to the defendant, was to continue a year and to commence some months in the future. Under the oral agreement for the extension of the tenancy until March 1, 1911, defendant received 50 acres in winter wheat, having 300 bushels of corn and 100 bushels of clover growing. This clearly was a part performance. If the tenancy which he contends was agreed upon is not recognized, then he will suffer the loss of the crops planted and all the fruits of his labor. It is contended, however, that in an action of this kind the plaintiff is not bound by the contract made in violation of the statute or by the contract set out of the statute and will not operate in violation of the

party wishing to avail himself of such contention must have recourse to an action in equity. In 1874 the statute of Forcible Entry and Detainer was amended so as to provide in the fourth clause thereof that the person entitled to the possession of lands or tenements may be restored thereto in the manner provided "when any lessee of the lands or tenements, or any person holding under him, holds possession without right after the determination of the lease or tenancy by its own limitation, condition or terms, or by notice to quit or otherwise." (Sec. 2, Ch. 57, Ill. Rev. Stat. 1939). Previous to the amendment of 1874, the statute did not contain the words "without right". The words "without right" clearly mean "without legal or equitable right". Hence, if a person in possession has a right to retain possession, whether legal or equitable, he may successfully assert such right. Since the 1874 amendment it has not been necessary for a defendant to go into equity in order to establish an equitable defense. When a plaintiff seeks possession under the Forcible Entry and Detainer statute, the tenant may assert his equitable defense at law. (Holt v. Nixon, 141 Fed. 952; Fuchs v. Peterson, 315 Ill. 370; Coyne v. South Shore De Luxe Laundry, 299 Ill. App. 275.")

party wishing to avail himself of such condition must have recourse
to an action in equity. In 1874 the statute of 1874 (chap. 100) and
Dedicator was amended so as to provide in the fourth clause thereof
that the person entitled to the possession of lands or tenements may be
restored thereto in the manner provided "and any lessee of the lands
or tenements, or any person holding under him, holds possession without
right after the determination of the lease or tenancy of the own land-
lord, condition or term, or by notice to quit or otherwise." (Sec. 1,
Ch. 57, Ill. Rev. Stat. 1889). Previous to the amendment of 1874, the
statute did not contain the words "without right". The words "without
right" clearly mean "without legal or equitable right". Hence, if a
person in possession has a right to retain possession, whether legal or
equitable, he may successfully assert such right. Since the 1874
amendment it has not been necessary for a defendant to go into equity
in order to establish an equitable defense. One who is in legal posses-
sion under the Statute of 1874 and who then acquires the land
may assert his equitable defense at law. 100 Ill. 306, 307
Thorne v. Peterson, 315 Ill. 370; Gay v. Gay, 315 Ill. 370
100 Ill. App. 376.

41536

310 I.A. 263²

ELECTRICAL SURVEY BUREAU, INC., a
corporation,

APPEAL FROM

Plaintiff - Appellant,

SUPERIOR COURT

v.

A. S. SCHULMAN ELECTRIC COMPANY, a
corporation,

CHOC COUNTY.

Defendant - Appellee.

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order and judgment entered in the Superior Court allowing the defendant's motion to strike plaintiff's fourth amended complaint, and dismissing the cause at plaintiff's costs in a contract action at law to recover the sum of \$18,908.50 and interest. The original complaint was filed on April 30, 1934 and the fourth amended complaint was filed April 19, 1940.

The merits of this controversy and the right of this court to discuss them seems to be precluded by the condition in which we find the record which has been submitted to this court.

After the complaint had been filed and motions to dismiss had been sustained some three times, the trial court thereafter on the fourth motion of the defendant, dismissed the suit.

The record shows that on October 10, 1935, the following order was entered:

"By stipulation of the parties to this suit filed, it is ordered that leave be and the same is now given to the plaintiff to file an amended complaint in this cause instant and the defendant be and is now required to answer its motion toward said complaint 20 days thereafter."

Thereafter, on July 1, 1938, an order was entered reading as follows:

"On motion of attorney for plaintiff it is ordered that leave be and the same is now given to him to file amended complaint by July 16, A. D. 1938. It is ordered that the defendant be and he is now required to answer the same by August 1st, A. D. 1938."

Thereafter, on March 13, 1939, the following order was entered:

ELECTRONIC RESEARCH, INC.,
corporation

PLAINTIFF - Defendant

v.

A. S. SCHULMAN, INC.,
corporation

Defendant - Plaintiff

U.S. DISTRICT COURT

This is an action brought by the Plaintiff against the Defendant for breach of contract. The Plaintiff alleges that the Defendant entered into a contract with it on or about July 1, 1954, for the purchase of certain electronic equipment. The Plaintiff claims that the Defendant failed to deliver the equipment as specified in the contract, and that the Defendant's failure to do so constituted a breach of the contract. The Plaintiff seeks damages in the sum of \$10,000.00, plus interest and costs. The Defendant denies the Plaintiff's allegations and claims that the contract was never entered into. The Defendant also claims that the Plaintiff's equipment was defective and that it was forced to return it to the Plaintiff. The Defendant seeks a judgment in its favor for the return of the equipment and for its costs.

The merits of this controversy are set forth in the pleadings. It is the Plaintiff's contention that the Defendant's failure to deliver the equipment as specified in the contract constituted a breach of the contract. The Plaintiff claims that the Defendant's failure to do so was willful and intentional. The Plaintiff seeks damages in the sum of \$10,000.00, plus interest and costs. The Defendant denies the Plaintiff's allegations and claims that the contract was never entered into. The Defendant also claims that the Plaintiff's equipment was defective and that it was forced to return it to the Plaintiff. The Defendant seeks a judgment in its favor for the return of the equipment and for its costs.

After the evidence has been taken, the Court will determine the facts of this case. If the Court finds in favor of the Plaintiff, it will award the Plaintiff the sum of \$10,000.00, plus interest and costs. If the Court finds in favor of the Defendant, it will award the Defendant the sum of \$0.00, plus interest and costs. The Court reserves the right to award punitive damages if it finds that the Defendant acted with malice or fraud.

IT IS ORDERED that the Plaintiff's motion for summary judgment be and it is so ordered. The Court finds that the Plaintiff has established its right to summary judgment. The Defendant's motion for summary judgment is denied. The Court will proceed to hear the case on its merits.

Very respectfully,
[Signature]
Attorney for Plaintiff

Respectfully,
[Signature]
Attorney for Defendant

On motion of attorney for Plaintiff, leave is granted to the Plaintiff to file an amended complaint in this case. The amended complaint is due by July 1, 1954. It is ordered that the Defendant shall be allowed to file a responsive pleading to the amended complaint by July 15, 1954. The Court reserves the right to modify this order at any time.

Respectfully,
[Signature]
The Clerk of Court

"IT IS ORDERED, that the plaintiff be and it is hereby given leave to file instant its Second Amended Complaint in this cause, and that defendant be given leave to file its answer within 10 days."

Instead of answering said second amended complaint, defendant filed a motion to dismiss.

On June 9, 1939, an order was entered, as follows:

"On motion of Solicitor for defendant second amended complaint is ordered stricken.

On motion of plaintiff leave is hereby given plaintiff to file third amended complaint on and including the 14th day of June, 1939. Defendant ruled to plead to said third amended complaint within ten days thereafter."

Thereafter, on June 21, 1939, a motion was made to strike the third amended complaint and dismiss the cause, and on April 19, 1940, attorney for plaintiff made a motion for leave to file a fourth amended complaint and rule the defendant to answer. On the same day the following order was entered:

"On motion of attorney for plaintiff for leave to file fourth amended complaint, and rule on defendant to answer, it is ordered that said motion be entered and continued to April 28, 1940."

On the same day, to-wit April 19, 1940, the fourth amended complaint was filed and so far as we have been able to find, the motion which was entered and continued until April 28, 1940, was never passed on by the court.

On May 17, 1940, a motion was made by the defendant to strike the fourth amended complaint.

Thereafter, on July 5, 1940, on motion of attorney for plaintiff leave was given to amend the fourth amended complaint on its face by adding to the end of paragraph 1 of Count I the words "not for profit".

On July 5, 1940, there was also entered the following order:

"On motion of Attorney for Defendant, the motion to strike Plaintiff's fourth amended complaint is allowed and the Plaintiff's fourth amended complaint is hereby stricken and this cause dismissed at Plaintiff's cost."

Thereafter, on July 18, 1940, an answer by the defendant was filed taking issue with all the allegations made by the complainant in his fourth amended complaint and on the same day, to-wit, July 18, 1940, a counter-claim by the defendant was filed against the plaintiff in which they ask for the sum of \$8,607.82, praying judgment against plaintiff therefor.

"IT IS ORDERED, that the plaintiff be and it is hereby given leave to file hereafter its second amended complaint in this cause, and that defendant be given leave to file its answer thereto to wit: on or before June 10, 1939."

Instead of answering said second amended complaint, defendant

filed a motion to dismiss.

On June 9, 1939, an order was entered, as follows:

"On motion of Solicitor for defendant second amended complaint is ordered sustained.
On motion of plaintiff leave is hereby given plaintiff to file third amended complaint on and including the 15th day of June, 1939. Defendant ruled to stand as said third amended complaint within ten days thereafter."

Thereafter, on June 11, 1939, a motion was made to strike the

third amended complaint and dismiss the cause, and on April 19, 1940,

attorney for plaintiff made a motion for leave to file a fourth amended

complaint and rule the defendant to answer. On the same day the

following order was entered:

"On motion of attorney for plaintiff for leave to file fourth amended complaint, and rule on defendant to answer, it is ordered that said motion be entered and continued to April 22, 1940."

On the same day, to-wit April 13, 1940, the fourth amended

complaint was filed and so far as we have been able to find, the motion

which was entered and continued until April 22, 1940, was never passed

on by the court.

On May 17, 1940, a motion was made by the defendant to strike

the fourth amended complaint.

Thereafter, on July 3, 1940, on motion of attorney for plaintiff

leave was given to amend the fourth amended complaint on the date by

adding to the end of paragraph 1 of Count 1 the words "not for profit."

On July 3, 1940, there was also entered the following order:

"On motion of attorney for plaintiff, the motion to strike Plaintiff's fourth amended complaint is allowed and the Plaintiff's fourth amended complaint is hereby stricken and this motion dismissed at Plaintiff's cost."

Thereafter, on July 18, 1940, an answer by the defendant was

filed taking leave with all the allegations made by the complaint in

his fourth amended complaint and on the same day, to-wit, July 18, 1940,

a counter-claim by the defendant was filed against the plaintiff in

which they ask for the sum of \$507.62, saying judgment should

Thereafter, on July 24, 1940, a notice of appeal was filed in which they state that the relief that the plaintiff-appellant prays is that "this cause be remanded to the trial court with instructions to require the defendant-appellee to answer plaintiff's Fourth Amended Complaint, and for such other relief as plaintiff-appellant may be entitled to by law."

As we have set out heretofore, the answer which plaintiff is seeking to have this court order to be filed, is already on file in the trial court. An issue has been made up by said answer as well as the counter-claim being filed claiming over against the plaintiff. We do not see where there is any order which we may enter here as no judgment except for costs was entered on the motion to dismiss, and no trial was had.

The record shows that having obtained a dismissal of plaintiff's suit, defendant waived the advantage which it had thereby obtained by filing an answer to said complaint and also a cross-complaint, thus waiving the order of dismissal and creating an issue between the parties hereto. There being an issue now pending in the trial court, we are precluded from discussing any of the features of the bill and the motion made to dismiss. We believe that because of the present state of the record, plaintiff is entitled to a hearing on the issues and in order to clarify the record, the order of dismissal together with costs should be vacated and the cause reinstated.

For the reasons herein given, the judgment of the Superior Court is reversed and the cause is remanded for a new trial with directions to vacate the order of dismissal of plaintiff's fourth amended complaint and proceed to trial on the issues made by said fourth amended complaint, the answer thereto and the cross-bill now pending in the Superior Court.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL, P.J. CONCURS.

Thereafter, on July 24, 1940, a notice of appeal was filed in which they state that the relief that the defendant seeks is that "this cause be remanded to the trial court with instructions to require the defendant to answer plaintiff's complaint, and for such other relief as plaintiff may be entitled to by law."

As we have set out herebefore, the answer which plaintiff is seeking to have this court order to be filed, is already on file in the trial court. An issue has been made up by the court as to whether the counter-claim being filed against the defendant is timely, and do not see where there is any question which we should take up. Judgment except for costs was entered in the trial court, and no trial was had.

The record shows that having obtained judgment in plaintiff's suit, defendant moved the court which it not properly obtained by filing an answer to said complaint and also a cross-complaint, thus waiving the order of dismissal and ordering the trial court to proceed. There being no issue now pending in the trial court, the court proceeded from discussing any of the questions of law which the motion made to dismiss. We believe it to be because of the fact that the record, plaintiff is entitled to a hearing on the motion to dismiss to clarify the record, and order of dismissal to be set aside, and be vacated and the cause reinstated.

For the reasons herein given, the judgment of the trial court is reversed and the cause is remanded to the trial court with directions to vacate the order of dismissal of plaintiff's counter-claim and proceed to trial on the issues now on file. Fourth amended complaint, the answer thereto and the cross-complaint pending in the Superior Court.

RECEIVED, U.S. COURTS,

BURKE, J. SPECIALLY CONCURRING:

The record is confusing. The defendant prevailed in its motion to strike the fourth amended complaint, and on July 5, 1940, the court struck such complaint and dismissed the cause at plaintiff's costs. I assume that what was intended was the entry of a judgment on the pleadings. However, on July 18, 1940, the defendant answered and on the same day filed a counterclaim. The notice of appeal was filed on July 24, 1940. It may be that the confusion arises from the fact that the motion to strike was presented in behalf of the defendants by attorney Charles P. Schwartz and the answer and counterclaim were filed by attorney Milton M. Adelman. It does not appear that any order was entered granting leave to file an answer or counterclaim. In view of the fact that the parties have not mentioned the answer or counterclaim, I am of the opinion that we should pass on each of the points raised by the plaintiff. I am of the opinion that the fourth amended complaint does not show on its face that the plaintiff was engaged in "business" contrary to the provisions of its charter. I agree that the defense of ultra vires, if such defense exists, does not appear from the face of the complaint, and that the cause of action is not barred by any provision of the Statute of Limitations and that the Statute of Frauds has no application. Furthermore, I am of the opinion that the fourth amended complaint complies with the provisions of the Civil Practice Act. I agree that the court was in error in striking the complaint and that the order striking the complaint and entering judgment for costs against the plaintiff should be reversed and that the cause should be remanded with directions that the defendant be given leave to file an answer.

HURLEY, J. SPECIALLY APPOINTED

The record is conflicting. The record in the case to strike the fourth amended complaint, on July 1, 1945, the court struck such complaint and a minute order was entered. I assume that what was intended was the entry of a judgment in favor of the defendant. However, on July 18, 1945, the defendant moved for judgment on the merits. The notice of motion was filed on July 18, 1945. It may be that the confusion arises from the fact that the motion for judgment was presented in behalf of the defendant, in a summary judgment. Schwartz and the answer and counterclaim were filed by summary judgment. M. Adelman. It does not appear that any order was entered granting leave to file an answer or counterclaim. In view of the fact that the parties have not mentioned the answer or counterclaim, it is of the opinion that we should pass on each of the points raised by the plaintiff. I am of the opinion that the fourth amended complaint was not shown on its face that the plaintiff was entitled to judgment. The provisions of the charter, I repeat, are not shown to exist. If such defense exists, does not appear from the record. I am of the opinion that the cause of action is not based on any violation of the Statute of Limitations and that the defense is not based on a violation. Furthermore, I am of the opinion that the fourth amended complaint complies with the provisions of the Civil Practice Law and Rules. The court was in error in striking the fourth amended complaint and entering judgment in favor of the defendant. The complaint should be returned and that the case be set for trial with directions that the defendant be given a reasonable time to answer.

41551

ALEXANDER SMULLAN,

Appellant,

APPEAL FROM

v.

CIRCUIT COURT,

KENSINGTON STEEL COMPANY,
a Corporation,

COOK COUNTY.

Appellee.

310 I.A. 264

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

May 11, 1938, plaintiff filed his complaint in chancery praying that defendant be required to specifically perform a contract entered into between the parties July 22, 1926, and that defendant be held liable for damages sustained by plaintiff on account of defendant's breach of the contract from October, 1936, to May 1, 1938. Defendant moved to strike the complaint on a number of grounds some of which were sustained and some overruled. The court held the complaint failed to state a cause for equitable relief but was sufficient as a complaint at law. Afterward the case was transferred to the law docket. It was heard before the court without a jury and by leave of court plaintiff filed an amendment to his complaint in which he prayed for the recovery of damages only. The court found for defendant, judgment was entered on the finding, and plaintiff appeals.

The record discloses that plaintiff, as agent and broker, has been in the insurance business in Chicago since 1891. July 22, 1926, plaintiff and defendant executed the following document: "In consideration of the purchase of twenty-five shares of preferred stock at \$100 per share and twenty-five shares of common stock at \$5 per share of the Kensington Steel Company of Chicago by Alexander Smullan, said Kensington Steel Company agrees to cede to Alexander Smullan the handling of their Compensation insurance at no higher rate than would be charged by any conference company.

(Signed) Kensington Steel Company

By Walter S. McKee, Pres.
Alexander Smullan."

41551

ALEXANDER SMULLAN,

Appellant,

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

v.

KENNINGTON STEEL COMPANY,

a Corporation,

Appellee.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

May 11, 1938, plaintiff filed his complaint in chancery praying that defendant be required to specifically perform a contract entered into between the parties July 30, 1936, and that defendant be held liable for damages sustained by plaintiff on account of defendant's breach of the contract from October, 1936, to May 1, 1938. Defendant moved to strike the complaint on a number of grounds some of which were sustained and some overruled. The court held the complaint failed to state a cause for equitable relief but was sufficient as a complaint at law. Afterward the case was transferred to the law docket. It was heard before the court without a jury and by leave of court plaintiff filed an amendment to his complaint in which he prayed for the recovery of damages only. The court found for defendant, judgment was entered on the finding, and plaintiff appeals.

The record discloses that plaintiff, as agent and broker, has been in the insurance business in Chicago since 1931. July 30, 1936, plaintiff and defendant executed the following document: "In consideration of the purchase of twenty-five shares of preferred stock at \$100 per share and twenty-five shares of common stock at \$5 per share of the Kennington Steel Company of Chicago by Alexander Smullan, said Kennington Steel Company agrees to cede to Alexander Smullan the handling of their corporation insurance at no higher rate than would be charged by any other insurance company." (Signed) Kennington Steel Company
By Walter E. McKee, Pres.
Alexander Smullan."

The Kensington Steel Company was in the process of being incorporated at the time and seven days later it received its charter from the State of Illinois, Walter S. McKee was elected president.

The evidence further shows Mr. Smullan purchased and paid for the 25 shares of preferred and 25 shares of common stock as provided by the terms of the contract and stock certificates were issued to him by the steel company. From the time of the incorporation of the steel company until October 1, 1936, Mr. Smullan procured Workmen's Compensation insurance for the steel company, the policies being issued by the Massachusetts Bonding and Insurance Company. March 16, 1936, the Workmen's Occupational Diseases Act was approved to take effect October 1, 1936. The evidence tends to show the Massachusetts Bonding and Insurance Company would not insure against occupational diseases under the act and that both plaintiff and defendant were notified of this fact. The Massachusetts Company September 19, 1936, notified defendant it was canceling its policies which cancelation would be effective September 28, 1936.

Afterward Mr. Smullan procured a binder from the Travelers Insurance Company to cover defendant but this insurance was not accepted by defendant and it obtained insurance from the Liberty Mutual Insurance Company. After October 1, plaintiff received no further business from defendant.

The court in deciding the case said: "I feel that there are two things which stand in the way of recovery; one thing is the duration of the contract was invalid; and the second, it wasn't properly ratified by the corporation."

We are unable to agree with the second reason mentioned by the learned trial judge. While there was no resolution of the board of directors specifically ratifying the contract, yet we think all the evidence shows it was ratified. Mr. McKee who signed the document as president was elected president when the incorporation was completed seven days after the document was signed. From that

The Kensington Steel Company was in the process of being incorporated at the time and several days later it received its charter from the State of Illinois. Walter S. Hokee was elected president.

The evidence further shows Mr. Smolian purchased and paid for the 25 shares of preferred and 25 shares of common stock as provided by the terms of the contract and stock certificates were issued to him by the steel company. From the time of the incorporation of the steel company until October 1, 1936, Mr. Smolian procured Workmen's Compensation insurance for the steel company, the policies being issued by the Massachusetts Bonding and Insurance Company. March 16, 1936, the Workmen's Occupational Diseases Act was applied to take effect October 1, 1936. The evidence tends to show the Massachusetts Bonding and Insurance Company would not insure against occupational diseases under the act and that both plaintiff and defendant were notified of this fact. The Massachusetts Bonding and Insurance Company, notified defendant it was canceling its policies which cancellation would be effective September 26, 1936.

Afterward Mr. Smolian procured a binder from the Travelers Insurance Company to cover defendant but this insurance was not accepted by defendant and it obtained insurance from the Liberty Mutual Insurance Company. After October 1, plaintiff received no further business from defendant.

The court in deciding the case said: "I find that there are two things which stand in the way of recovery; one thing is the duration of the contract was invalid; and the second, it wasn't properly ratified by the corporation."

We are unable to agree with the second reason advanced by the learned trial judge. While there is no resolution of the board of directors specifically ratifying the contract, yet we think all the evidence shows it was ratified. Mr. Hokee who signed the document as president was elected president when the incorporation was completed even days after the document was signed. From that

time on Mr. Smullan for a period of ten years procured compensation insurance for the steel company. We think it clear the parties acted under the contract and defendant is estopped to contend there was no ratification.

We are of opinion, however, that since no period of time was mentioned in the contract during which it should be binding, it was terminable at will, that is, it might be terminated at any time by either party. 2 C.J.S., §74, p. 1155; Joliet Bottling Co. v. Joliet Brewing Co., 254 Ill. 215; Davis v. Fidelity Fire Ins. Co., 208 Ill. 375; Orr v. Ward, 73 Ill. 318.

In discussing the right of revoking the authority of an agent the author in 2 C.J.S., §74, says: "An agency declared to be exclusive but having no fixed duration can be revoked by the principal with impunity at any time." Citing Curtiss Candy Co. v. Silberman, 45 F. (2d) 451; Biber Bros. News Co. v. New York Evening Post, 258 N.Y.S. 31.

In the Joliet Bottling Co. case the parties entered into a written agreement whereby the brewing company agreed to furnish beer to the bottling company upon certain conditions. The bottling company leased premises in which to conduct the bottling of the beer and installed machinery for which it spent about \$40,000, and afterward commenced bottling the beer, selling it and continuing to do so for about a year. Afterward the brewing company refused to carry out its part of the agreement. One of the contentions was that the contract was terminable at will. The court said it was contended "that the period of its duration is not fixed but is indefinite, and it was therefore terminable at the will of either of the parties. *** No mention is made of any period of time the agreement should continue in force. ***

" *** no time being fixed during which the agreement should continue in force, it was terminable at the will of either party. Davis v. Fidelity Fire Ins. Co., 208 Ill. 375; Orr v. Ward, 73 id. 318."

time on Mr. Sullivan for a period of ten years procured compensation insurance for the steel company. We think it clear the parties acted under the contract and defendant is estopped to contend there was no ratification.

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"*** no time being fixed during which the agreement should continue in force, it was terminable at the will of either party. Davis v. Fidelity Fire Ins. Co., 208 Ill. 375; Orv v. Ward, 78 Ill. 318."

In the instant case no time is mentioned in the contract of July 22, 1926, during which it should be effective. It simply provides that in consideration of plaintiff purchasing the stock for \$2625 the steel company "agrees to cede to Alexander Smullan the handling of their compensation insurance." Under the rule announced in the Bottling case the contract is terminable at will and was terminated by defendant prior to October 1, 1936.

Each party having the right to terminate the contract at any time and defendant having done so, it is not liable in damages. And the result is the same although plaintiff paid a valuable consideration for entering into the contract. Vol. 1, Williston on Contracts, (Rev. Ed.) §280; Walker v. Denison, 86 Ill. 142; W. B. Martin & Son v. Lamkin, 188 Ill. App. 431; Goetz v. Ochala, 180 Ill. App. 458; Bonney v. Smith, 17 Ill. 531.

Professor Williston in discussing when an agent's authority is irrevocable says: "Only when the power of an agent is coupled with an interest does it become irrevocable. *** In order for an agency to be irrevocable, there must be specific present interest in the contract or property to which the agency is subservient. Owing to the looseness of the catch phrase, 'a power coupled with an interest,' the Restatement of Agency has abandoned it and simply refers to these irrevocable agency cases as those in which the agent is owner of a right in the contract which he makes for his principal, or is the holder of a power given as security."

In the instant case Mr. Smullan was not the owner of a right or interest in the contract which he made for the steel company with the insurance company.

In the Lamkin case [188 Ill. App. 431], a real estate agent brought suit against the owner of real estate to recover commissions for a sale claimed to have been made by plaintiffs. At the close of plaintiffs' case there was a directed verdict for defendant and plaintiffs appealed. Lamkin owned 160 acres of land in Saline County and engaged plaintiffs who were real estate brokers to sell

In the instant case no time is mentioned in the contract of July 22, 1936, during which it should be effective. It simply provides that in consideration of plaintiff purchasing the stock for \$2625 the steel company "agrees to cede to Alexander Smullen the handling of their compensation insurance." Under the rule announced in the Bottling case the contract is terminable at will and was terminated by defendant prior to October 1, 1936.

Each party having the right to terminate the contract at any time and defendant having done so, it is not liable in damages. And the result is the same although plaintiff paid a valuable consideration for entering into the contract. Vol. I, Williston on Contracts, (Rev. Ed.) §280; Walker v. DeLacour, 88 Ill. 142; W. B. Martin & Son v. Larkin, 128 Ill. App. 481; Goske v. Gobala, 130 Ill. App. 458; Bonney v. Smith, 17 Ill. 331.

Professor Williston in discussing when an agent's authority is irrevocable says: "Only when the power of an agent is coupled with an interest does it become irrevocable. *** In order for an agency to be irrevocable, there must be specific present interest in the contract or property to which the agency is subservient. Owing to the looseness of the catch phrase, 'a power coupled with an interest,' the statement of agency has abandoned it and simply refers to these irrevocable agency cases as those in which the agent is owner of a right in the contract which he makes for his principal, or is the holder of a power given as security."

In the instant case Mr. Smullen was not the owner of a right or interest in the contract which he made for the steel company with the insurance company.

In the Larkin case [128 Ill. App. 481], a real estate agent brought suit against the owner of real estate to recover commissions for a sale claimed to have been made by plaintiff. At the close of plaintiff's case there was a directed verdict for defendant and plaintiff appealed. Larkin owned 130 acres of land in Saline County and engaged plaintiff who was real estate broker to sell

it. A prospective purchaser found by plaintiffs went to examine the land in June. Plaintiffs priced the land to him at \$90 an acre. July 13, Lamkin died testate devising the land to his widow. Three days later she, as executrix, notified plaintiffs not to sell the land. July 23, the prospective purchaser came back to see plaintiffs about purchasing the land and claimed to have entered into a contract with plaintiffs to purchase the land for \$1500 in excess of the price for which Lamkin had authorized plaintiffs to sell, and that under plaintiffs' agreement with Lamkin they were entitled to this excess of \$1500. The court held the agency was terminated by the death of Lamkin and the sale could not be made thereafter. Plaintiffs contended the death of Lamkin did not terminate their right because their appointment "was coupled with an interest and for a valuable consideration, and being so was irrevocable. *** In order to determine whether or not this was a power coupled with an interest, it is necessary to ascertain what is meant by the courts, in the use of this term. In the case of Bonney v. Smith, supra, it is said: 'A power, coupled with an interest, must create an interest in the thing itself upon which the power is to operate; the power and estate must be united.'" The court then quoted from the Walker case [86 Ill. 146] as follows: "As to the exception of a power coupled with an interest, it is not enough, as appellant supposed, that the agent has an interest in the execution of the power. The meaning of that expression underwent discussion and was authoritatively determined in the case of Hunt v. Rousmanier's Administrator, 8 Wheat. 174, where it was held that 'a power coupled with an interest' is where the power or authority is coupled with an interest in the thing itself, actually vested in the agent; and that it was not an interest in that which is produced by the exercise of the power."

For the reasons stated, the judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, J., and McSurely, J. concur.

11. A prospective purchaser found by plaintiffs went to examine the land in June. Plaintiffs priced the land to him at \$90 an acre. July 13, Larkin died testate devising the land to his widow. Three days later she, as executrix, notified plaintiffs not to sell the land. July 23, the prospective purchaser came back to see plaintiffs about purchasing the land and claimed to have entered into a contract with plaintiffs to purchase the land for \$1500 in excess of the price for which Larkin had authorized plaintiffs to sell, and that under plaintiffs' agreement with Larkin they were entitled to this excess of \$1500. The court held the agency was terminated by the death of Larkin and the sale could not be made thereafter. Plaintiffs contended the death of Larkin did not terminate their right because their appointment "was coupled with an interest and for a valuable consideration, and being so was irrevocable. *** In order to determine whether or not this was a power coupled with an interest, it is necessary to ascertain what is meant by the courts, in the use of this term. In the case of Bonney v. Smith, supra, it is said: 'A power, coupled with an interest, must create an interest in the thing itself upon which the power is to operate; the power and estate must be united.' The court then quoted from the Walker case [36 Ill. 146] as follows: "as to the exception of a power coupled with an interest, it is not enough, as appellant supposed, that the agent has an interest in the execution of the power. The meaning of that expression underwent discussion and was authoritatively determined in the case of Hunt v. Hunt v. Hosmer's Administrator, 8 West. 174, where it was held that 'a power coupled with an interest' is where the power or authority is coupled with an interest in the thing itself, actually vested in the agent; and that it was not an interest in that which is produced by the exercise of the power."

For the reasons stated, the judgment of the circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, J., and McGraw, J. concur.

41582

THOMAS JEFF BRUMIT,

Appellant,

APPEAL FROM

v.

SUPERIOR COURT,

R. M. WASSON and INDIAN
MOTORCYCLE SALES COMPANY,
a Corporation,

COOK COUNTY.

Appellees.

310 I.A. 264²

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against C. E. Tranter, R. M. Wasson and Martin Driscoll & Company, a corporation, to recover damages for personal injuries sustained by him as a result of a motorcycle striking him. Afterward the Indian Motorcycle Sales Company was made an additional defendant. There was a jury trial and at the close of plaintiff's case defendant Martin Driscoll & Company was, on plaintiff's motion, dismissed. After the trial was completed the jury returned a verdict of \$2500 against the remaining three defendants, C. E. Tranter, R. M. Wasson and Indian Motorcycle Company, a corporation.

Upon the return of the verdict, December 22, 1939, the court entered judgment against the three defendants. Afterward the judgment against Tranter was vacated and the suit dismissed as to him, based upon a covenant not to sue. Thereupon plaintiff filed a remittitur of \$750, apparently being the amount given for the covenant not to sue, and judgment for the balance of the verdict, \$1750, against Wasson and the Indian Motor Sales Company was vacated, their motion for a judgment notwithstanding the verdict was sustained and plaintiff appeals.

The record discloses that about 9 o'clock on the morning of August 20, 1938, plaintiff was walking east on the south sidewalk of Harrison street east of Clark street. Defendant Tranter was driving his automobile east in Harrison street and Wasson was riding a motorcycle east in Harrison street. When they reached the west side of Clark street the red light was against them and they stopped.

THOMAS LEFF BRUNNIT,
Appellant,
v.
R. M. WASSON and INDIA
MOTORCYCLE SALES COMPANY,
a Corporation,
Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

3101 A. 264

MR. PRESIDING JUSTICE CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against O. E. Tranter, R. M. Wasson and Martin Driscoll & Company, a corporation, to recover damages for personal injuries sustained by him as a result of a motorcycle striking him. Afterward the Indian Motorcycle Sales Company was made an additional defendant. There was a jury trial and at the close of plaintiff's case defendant Martin Driscoll & Company was on plaintiff's motion, dismissed. After the trial was completed the jury returned a verdict of \$2500 against the remaining three defendants, O. E. Tranter, R. M. Wasson and Indian Motorcycle Company, a corporation.

Upon the return of the verdict, December 22, 1929, the court entered judgment against the three defendants. Afterward the judgment against Tranter was vacated and the suit dismissed as to him, based upon a covenant not to sue. Thereupon plaintiff filed a remittitur of \$750, apparently being the amount given for the covenant not to sue, and judgment for the balance of the verdict, \$1750, against Wasson and the Indian Motor Sales Company was vacated, their motion for a judgment notwithstanding the verdict was sustained and plaintiff reversed.

The record discloses that about 9 o'clock on the morning of August 20, 1928, plaintiff was walking east on Clark street giving his automobile east in Harrison street and Wasson was riding a motorcycle east in Harrison street. When they reached the west side of Clark street the red light was against them and they stopped.

The motorcycle was to the south of Tranter's automobile. Another eastbound automobile was ahead of Tranter and an automobile was also in front of the motorcycle. When the light turned to green the traffic started east.

All the evidence is to the effect that the car ahead of Tranter's gradually pulled toward the south side of Harrison street so as to pass street cars which came to a stop a block or so east near State street, where they turned to go on the north or westbound track of Harrison street. Tranter followed the car ahead of him and pulled towards the south. The motorcycle proceeded at the same time near the south side of Tranter's automobile. The front of the motorcycle was at about the middle of Tranter's automobile. As they proceeded a short distance east of Clark street Tranter's car, he contends, gradually pulled towards the south and the right hind fender came in contact with the left handle bar of the motorcycle. Wasson was thrown from the motorcycle and it ran up on the sidewalk and struck and injured plaintiff.

Defendants Wasson and the Indian Motor Sales Company, contend that all of the evidence, viewed in the light most favorable to plaintiff, shows that defendant Wasson, in operating the motorcycle, was guilty of no negligence and therefore the judgment in defendants' favor n.o.v. should be affirmed.

On the other side plaintiff's position is that the evidence was sufficient to warrant the jury in finding that the negligence of Wasson contributed to plaintiff's injuries and the court erred in entering judgment n.o.v.

December 28, 1939, defendants, Wasson and Indian Motor Sales Company, filed a motion for a new trial and on the same day another motion for a judgment in their favor n.o.v. The latter motion was sustained but the motion for a new trial was not passed upon and apparently the court's attention was not called to it.

It is obvious that plaintiff was entitled to a verdict and judgment against one or all of the defendants - he was in no way at

The motorcycle was to the south of [redacted] automobile. Another [redacted] automobile was ahead of [redacted] and an automobile was also in front of the motorcycle. When the light turned to green the traffic started east.

All the evidence is to the effect that the car ahead of [redacted] gradually pulled toward the south side of Harrison street so as to pass street cars which came to a stop a block or so east near State street, where they turned to go on the north or eastward track of Harrison street. [redacted] followed the car ahead of him and pulled toward the south. The motorcycle proceeded at the same time near the south side of [redacted] automobile. The front of the motorcycle was at about the middle of [redacted] automobile. As they proceeded a short distance east of Clark street [redacted] car, he contends, gradually pulled toward the south and the right hand tender came in contact with the left handle bar of the motorcycle. [redacted] was thrown from the motorcycle and it ran on the sidewalk and struck and injured plaintiff.

Defendants, [redacted] and the Indian Motor Sales Company, contend that all of the evidence, viewed in the light most favorable to plaintiff, shows that defendant [redacted], in operating the motorcycle, was guilty of no negligence and therefore the judgment in defendants' favor n.o.v. should be affirmed.

On the other side plaintiff's position is that the evidence was sufficient to warrant the jury in finding that [redacted] was negligent in operating the motorcycle and that [redacted] was negligent in entering [redacted] n.o.v.

December 22, 1931, [redacted] and Indian Motor Sales Company, filed a motion for a new trial on the same day another motion for a judgment in their favor n.o.v. The latter motion was sustained but the motion for a new trial was not granted upon and apparently the court's attention was not called to it. It is obvious that plaintiff was entitled to a new trial and judgment against one or all of the defendants - the court's decision

fault.

Where a motion is made for judgment n.o.v. it should be overruled if there is any evidence from which the jury can reasonably find in favor of plaintiff. In such case the evidence with all reasonable inferences arising therefrom must be construed most strongly in favor of plaintiff. Boyda Dairy Co. v. Cont. Cas. Co., 299 Ill. App. 469; Capelle v. Chicago & N. W. Ry. Co., 280 Ill. App. 471; McCune v. Reynolds, 288 Ill. 188. The rule was the same prior to the passage of §68 of the Civil Practice act when passing on a motion for a directed verdict. Libby, McNeill & Libby v. Cook, 222 Ill. 206. In the Cook case the court said: "In passing upon a motion for a peremptory instruction the question of the preponderance of the evidence does not arise at all. Evidence fairly tending to prove the cause of action set out in the declaration may be the testimony of one witness only, and he may be directly contradicted by twenty witnesses of equal or greater credibility; still the motion must be denied, and if a verdict for the plaintiff follows, the question whether it is manifestly against the weight of the evidence is for the trial court upon motion for a new trial."

Counsel for defendants say there was no evidence tending to prove any negligence on the part of Wasson; that Wasson was called by plaintiff as a witness and not for cross-examination under §60 of the Civil Practice act. That he testified when the traffic lights changed on Clark street for eastbound traffic on Harrison street, defendant "Tranter was to the north and left of Wasson. Wasson traveled along at the side and at the rear of Tranter's automobile. Wasson was traveling in his proper lane in a lawful and orderly manner and it clearly appears that except for the actions on the part of the defendant Tranter there would have been no collision between the motor vehicles and no accident resulting. The fact that an accident occurs does not create an inference of negligence and we contend that there must be evidence of negligence furnished by the testimony of eye-witnesses showing that Wasson's actions were negli-

fault.

Where a motion is made for judgment n.o.v. it should be over-
ruled if there is any evidence from which the jury can reasonably
find in favor of plaintiff. In such case the evidence with all
reasonable inferences arising therefrom must be considered most
strongly in favor of plaintiff. Bowden v. State, 200 Ill. App.
200 Ill. App. 489; Ganley v. Chicago & N.W. Ry. Co., 200 Ill. App.
471; McGurne v. Reynolds, 200 Ill. App. 489. The rule was the same prior
to the passage of §83 of the Civil Practice Act when passing on a
motion for a directed verdict. Libby, Libby & Libby v. Cook, 200
Ill. 206. In the Cook case the court said: "In passing upon a
motion for a peremptory instruction the question of the preponderance
of the evidence does not arise at all. Evidence tending to
prove the cause of action set out in the complaint may be the
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by twenty witnesses of equal or greater credibility; still the
motion must be denied, and if a verdict for the plaintiff follows,
the question whether it is manifestly against the weight of the
evidence is for the trial court upon motion for a new trial."
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prove any negligence on the part of reason; that reason was called
by plaintiff as a witness and not for cross-examination under §83
of the Civil Practice Act. That he testified when the traffic lights
changed on Clark street for eastbound traffic on Madison street,
defendant "enter was to the north and left of the center
traveled along at the side and at the rear of the motor car.
Reason was traveling in the motor car in a lawful and orderly
manner and it clearly appears that defendant was not negligent in
of the defendant's motor car which would have been a violation of the
the motor vehicle and no fault need be assigned. The fact that the
accident occurs does not create an inference of negligence. It is
contented that there must be evidence of negligence furnished by
testimony of eye-witnesses showing that reason's negligence was in fact

gent and careless and caused the accident. The motor vehicles of Wasson and Tranter proceeded across Clark Street, reached the east side of Clark Street and a few feet beyond it, when suddenly and without warning Tranter turned to the right or toward the south curb in front of the defendant Wasson proceeding on his motorcycle, Tranter's rear fender catching Wasson's handlebar." But we think the evidence referred to by counsel in support of this argument does not show that Tranter "suddenly" turned to the right or towards the south. The witness Wasson testified: "He was a little ahead of me, I mean the front end of the car; he was gaining on me, going a little faster than I was. He was still beside me, the back end of the car was still beside me, his back fender. He turned to the right in front of me. When he turned, probably the front was about even with his rear door, about half the car had passed me. I did not have notice or warning of any sort that he was going to do it. This turning, it was a little short."

On the other hand Tranter gave testimony to the effect that he was a little ahead of the motorcycle and behind an automobile and that he followed the automobile which pulled towards the south side of Harrison street. "I followed the car ahead of me. As we got to the other side of the intersection, we pulled over from the street car track in order to get off of that, and there was quite an impact on my fender, the right rear wheel."

On cross-examination by counsel for defendants, Tranter testified: "I eventually wanted to get off the tracks because in another block the street cars come to a dead stop. I made a turn to the right just about when I cleared the intersection. *** There was nothing to my right to my knowledge. I made no definite turn to the right. I don't mean I went straight ahead. *** up until this accident happened and afterwards. I made no turn but gave gradually to get out of the track eventually. I never was in the street car track. I turned my wheel probably slightly to the right or south," when the accident happened.

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 Wason and Tranter proceeded across Clark street, crossed the east
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 without warning Tranter turned to the right on toward the south
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 the evidence referred to by counsel in support of this argument
 does not show that Tranter "suddenly" turned to the right on towards
 the south. The witness Wason testified: "He was a little ahead
 of me, I mean the front end of the car; he was gaining on me, going
 a little faster than I was. He was still beside me, the back end of
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 accident happened and afterwards. I made no turn but gave gradually
 to get out of the track eventually. I never was in the street car
 track. I turned my wheel probably slightly to the right on going,"
 when the accident happened.

The witness Miller, called by plaintiff, testified that on the morning in question he came from his home near 78th and south Peoria streets and was riding on a northbound Clark street car when he got off the front end of the car as it stopped at the south side of Harrison street, and was walking east on the south sidewalk of Harrison street when the accident occurred. "There was an automobile coming along south of the car track and a motorcycle not close to the curb, *** about four feet. It seemed like that automobile kind of brushed aside the motorcycle and knocked it right over *** It seemed like the automobile crowded the motorcycle to the curb."

On cross-examination by counsel for Wasson, Miller further testified: "The automobile was about two feet south of the car track. The automobile and motorcycle were about even. It seemed like the motorcycle tried to get by the automobile. The motorcycle was about in the middle of the car. *** The automobile swung over about two or three feet. It hit the motorcycle about the middle."

On further cross-examination by counsel for Tranter, Miller testified: "I noticed the motorcycle trying to get ahead of the automobile; he was blowing his horn like he wanted to pass him."

In view of the evidence we think the court was not warranted in entering judgment n.o.v. The jury might have reasonably inferred that when Tranter started to pull over toward the south side of Harrison street Wasson should have slacked up so as to avoid a collision because the automobile was admittedly a little ahead of him. They might on the other hand draw the inference that Wasson was in no way to blame, but on a motion for judgment n.o.v. it was for the jury to draw such inferences. Kavale v. Morton Salt Co., 242 Ill. App. 205; Denny v. Goldblatt Bros. Inc., 298 Ill. App. 325; Cosmo v. Seegers, 307 Ill. App. 187; Bloodgood v. Whitney, 235 N.Y. 110; Moore v. Rosenmond, 238 N.Y. 356. On a motion for a new trial the court can approve or set aside the verdict.

While in the instant case no mention is made by counsel that a motion for a new trial was made but not disposed of, yet we

The witness Miller, called by Plaintiff, testified that on the morning in question he came from his home near 78th and south Georgia streets and was riding on a northbound Olcott street car when he got off the front end of the car as it stopped at the south side of Harrison street, and was walking east on the south sidewalk of Harrison street when the accident occurred. "There was an automobile coming along south of the car track and a motorcycle not close to the curb, *** about four feet. It seemed like that automobile kind of brushed aside the motorcycle and knocked it right over *** It seemed like the automobile crowded the motorcycle to the curb."

On cross-examination by counsel for defense, Miller further testified: "The automobile was about two feet south of the car track. The automobile and motorcycle were about even. It seemed like the motorcycle tried to get by the automobile. The motorcycle was about in the middle of the car. *** The automobile swung over about two or three feet. It hit the motorcycle about the middle."

On further cross-examination by counsel for Plaintiff, Miller testified: "I noticed the motorcycle trying to get ahead of the automobile; he was blowing his horn like he wanted to pass him."

In view of the evidence we think the court was not warranted in entering judgment n.o.v. The jury might have reasonably inferred that when Tranter started to pull over toward the south side of Harrison street Mason should have backed up so as to avoid a collision because the automobile was admittedly a little ahead of him. They might on the other hand draw the inference that Mason was in no way to blame, but on a motion for judgment n.o.v. it was for the jury to draw such inferences. Kvale v. Standard Oil Co., 242 Ill. App. 305; Benny v. Goldblatt Bros. Inc., 198 Ill. App. 393; Goemo v. Beers, 307 Ill. App. 187; Blodgett v. Blodgett, 245 Ill. 110; Moore v. Rossmore, 238 N.Y. 356. On a motion for a new trial the court can approve or set aside the verdict.

While in the instant case no mention is made of counsel that a motion for a new trial was made but not disposed of, yet we

are of opinion that what we said in Dahlberg v. Chicago City Bank & Trust Co., #41571, opinion filed this day, is applicable here:

"Since the filing of the briefs, the Supreme court of this state has handed down two opinions in Walaite v. C. R. I. & P. Ry. Co., 376 Ill. 59, and Goodrich v. Sprague, 376 Ill. 80, on the question of procedure to be followed under §68 of the Civil Practice act. In each of these cases there was a verdict in plaintiff's favor after which defendant filed two motions - a motion for a judgment for defendants non obstante veredicto and for a new trial. The motion for judgment n.o.v. was allowed and judgment entered for defendants, the motions for a new trial were not passed upon but were passed upon by this court in Walaite v. C. R. I. & P. Ry. Co., 306 Ill. App. 5; Goodrich v. Sprague, 304 Ill. App. 556, which was held by the Supreme court to be error, holding that the jurisdiction of this court to review judgments of the trial court is appellate only; that the motion for a new trial was addressed to the trial court and the judgments of this court in the two cases were reversed and the cause remanded with directions to the trial court to pass upon the motions for new trials.

"In the Goodrich case, our Supreme court referred to the case of Montgomery Ward & Co. v. Duncan, 311 U. S. 243, where a somewhat similar question was under consideration and said that the Supreme court of the United States suggested that to prevent delay and unnecessary retrials the trial court should have passed on both motions. While in the two cases decided by our Supreme court the Appellate court passed on the motions for new trials (which is not the fact in the case at bar), yet we are of opinion the trial judge should pass on the motion for a new trial. Following the suggestion of the United States Supreme court in the Duncan case, we think both motions should have been passed upon by the trial court."

For the reasons stated, the judgment of the Superior court of Cook county is reversed and the cause remanded with directions to set aside the judgment entered in favor of defendants notwithstanding the verdict and to pass upon defendants' motion for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, J., and McSurely, J. concur.

are of opinion that what we said in Walbridge v. Chicago City Bank
& Trust Co., 448 U.S. 107, opinion filed this day, is applicable here:
"Since the filing of the briefs, the supreme court of this state has
handed down two opinions in Walbridge v. O. & N. Ry. Co., 378
Ill. 52, and Goodrich v. Sprague, 304 Ill. App. 886, on the question of
procedure to be followed under § 63 of the Civil Practice Act. In
each of these cases there was a reversal in the state court, and after
which defendant filed two motions - a motion for a judgment for de-
fendant non obstante veredicto and for a new trial. The motion for
judgment n.o.v. was allowed and judgment entered for defendant, the
motions for a new trial were not passed upon but were passed upon
by this court in Walbridge v. O. & N. Ry. Co., 304 Ill. App. 886;
Goodrich v. Sprague, 304 Ill. App. 886, which was held by the
supreme court to be error, holding that the joint motion of this
court to review judgments of the trial court is applicable only; that
the motion for a new trial was addressed to the trial court and the
judgments of this court in the two cases were reversed and the cases
remanded with directions to the trial court to pass upon the motions
for new trials.
"In the Goodrich case, our supreme court reversed its case
of Montgomery Ward & Co. v. United States, 304 Ill. App. 886, where a somewhat
similar question was under consideration and said that the state
court of the United States suggested that to prevent delay and un-
necessary retrials the trial court should have passed upon both
motions. While in the two cases reversal of our supreme court in
Appellate court passed on the motions for new trial, it is not
the fact in the case at bar, that the trial court passed upon both
motions on the motion for a new trial. Both of the motions
of the United States Supreme court in the Walbridge case, in which both
motions should have been passed upon by the trial court."
For the reasons stated, the judgment of the supreme court
of Cook county is reversed and the case remanded with directions to
set aside the judgment entered in favor of defendant and to pass upon the
motions for a new trial and to pass upon defendant's motion for a new trial.
FORWARDED AND RETURNED BY REGISTER.

41557

ROTH-ADAM FUEL COMPANY,
a Corporation,

Plaintiff,

v.

FRANK L. ADAM,

Defendant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

FRANK L. ADAM,
(Counter-Claimant) Appellant,

v.

ROTH-ADAM FUEL COMPANY, a
Corporation, EDWIN C. ROTH and
DANIEL H. ROTH,
(Counter-Defendants) Appellees.

310 I.A. 265

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Roth-Adam Fuel Company, a corporation, filed a complaint in equity alleging that defendant Frank L. Adam had been employed by it since its incorporation in 1933; that he was a salesman on a weekly salary during that period and was discharged in November, 1939; that since then he had been collecting moneys due plaintiff upon the representation he was still employed by plaintiff; plaintiff sought an injunction against further representations to this effect and further collection of plaintiff's moneys by defendant.

Defendant filed a counterclaim stating he was a partner in plaintiff's company from 1929 to 1940, and asked for an accounting of all the profits in the business. The counter defendants answered this, denying the partnership. The cause was referred to a master in chancery, Louis J. Behan, who, after hearing evidence, filed his report finding plaintiff entitled to the relief prayed for in its complaint and recommending that the counterclaim of Adam be dismissed for want of equity. The chancellor overruled all exceptions, entered a decree approving the report, dismissed the counterclaim and defendant appeals.

The master found that plaintiff was duly incorporated on

ROTH-ADAM FUEL COMPANY,
a Corporation,
Plaintiff,

v.

FRANK L. ADAM,
Defendant.

FRANK L. ADAM,
(Counter-Claimant) Appellant,

v.

ROTH-ADAM FUEL COMPANY, a
Corporation, EDWIN G. ROTH and
DANIEL H. ROTH,
(Counter-Defendants) Appellees.

APPEAL FROM
SOUTH RICH COURT,
COOK COUNTY.

MR. JUSTICE ROBERTLY DELIVERED THE OPINION OF THE COURT.

Roth-Adam Fuel Company, a corporation, filed a complaint in equity alleging that defendant Frank L. Adam had been employed by it since its incorporation in 1938; that he was a salesman on a weekly salary during that period and was discharged in November, 1939; that since then he had been collecting money due plaintiff upon the representation he was still employed by plaintiff; plaintiff sought an injunction against further representations to this effect and further collection of plaintiff's money by defendant.

Defendant filed a counterclaim stating he was a partner in plaintiff's company from 1939 to 1940, and asked for an accounting of all the profits in the business. The counter-defendants answered this, denying the partnership. The cause was referred to a master in chancery, Louis J. Behan, who, after hearing evidence, filed his report finding plaintiff entitled to the money prayed for in the complaint and recommending that the counterclaim of Adam be dismissed for want of equity. The chancellor overruled all exceptions, entered a decree approving the report, dismissed the counterclaim and defendant appeals.

The master found that plaintiff was duly incorporated on

March 14, 1933, and was conducting a general coal and merchandising business in Chicago; that defendant, Frank Adam, was employed by the corporation as a salesman until November 27, 1939, when he was discharged; that since the time of his discharge he has, without any right or authority, endeavored to collect money from customers of plaintiff and has made collections from these customers.

The master further found that up to about April 1, 1929, the defendant and Edwin C. Roth, with R. W. Collins, now deceased, entered into a tentative agreement to engage in the coal business under the name Roth-Adam Fuel Company. There was some evidence tending to show there was an agreement between each of the three parties that each should invest certain cash as the capital of the proposed firm. The master found that the evidence as to the actual arrangement of the amount of cash to be invested by each was very indefinite; that in February, 1929, Roth and Collins opened a bank account under the name Roth-Adam Fuel Company, and in that account was deposited \$2000 by Collins and several thousand dollars by Roth, but in March, 1929, Collins withdrew from the proposed partnership and received a check for \$2000, the amount he had previously deposited. The master held that the withdrawal by Collins had the legal effect of terminating any partnership that might have existed between Roth, Collins and Adam. The master also found that Adam had failed to invest any portion of the capital which it had been agreed upon by the parties each would invest.

The master further found that the coal business under the name Roth-Adam Fuel Company, which commenced on April 1, 1929, paid Adam \$35 a week, which, according to the books of the company, was salary; that this amount was subsequently increased, and there is no evidence of any objection by Adam to the amount he received being described as his weekly salary. Moreover, although Adam admits he knew of the incorporation of the company, he made no inquiry as to its financial situation. The master recommended that a decree be entered in favor of plaintiff as prayed for in the com-

March 14, 1933, and was conducting a general coal and merchandising business in Chicago; that defendant, Frank Adam, was employed by the corporation as a salesman until November 27, 1932, when he was discharged; that since the time of his discharge he has, without any right or authority, endeavored to collect money from customers of plaintiff and has made collections from these customers.

The master further found that up to about April 1, 1932, the defendant and Edwin C. Roth, with A. A. Collins, now deceased, entered into a tentative agreement to engage in the coal business under the name Roth-Adam Fuel Company. There was some evidence tending to show there was an agreement between each of the three parties that each should invest certain cash as the capital of the proposed firm. The master found that the evidence as to the actual arrangement of the amount of cash to be invested by each was very indefinite; that in February, 1932, Roth and Collins opened a bank account under the name Roth-Adam Fuel Company, and in that account was deposited \$2000 by Collins and several thousand dollars by Roth, but in March, 1932, Collins withdrew from the proposed partnership and received a check for \$2000, the amount he had previously deposited. The master held that the withdrawal by Collins had the legal effect of terminating any partnership that might have existed between Roth, Collins and Adam. The master also found that Adam had failed to invest any portion of the capital which it had been agreed upon by the parties each would invest.

The master further found that the coal business under the name Roth-Adam Fuel Company, which commenced in April 1, 1932, with Adam \$35 a week, which, according to the books of the company, was salary; that this amount was subsequently increased, and there was no evidence of any objection by Adam to the amount he received being described as his weekly salary. Moreover, although Adam admits he knew of the incorporation of the company, he says he has no duty as to its financial situation. The master recommended that a decree be entered in favor of plaintiff as prayed for in the com-

plaint and that the counterclaim of Frank L. Adam be dismissed for want of equity.

We are of the opinion the facts justify the finding of the master and the decree entered by the chancellor. Where the findings of a master in chancery are supported by a decree of the chancellor, this will be given great weight. Pasedach v. Auw, 364 Ill. 491.

The decree is affirmed.

DECREE AFFIRMED.

O'Connor, P.J., and Matchett, J., concur.

plaint and that the counterclaim of Frank L. Adams be dismissed for want of equity.

We are of the opinion the facts justify the finding of the master and the decree entered by the chancellor. Where the findings of a master in chancery are supported by a decree of the chancellor, this will be given great weight. Beasdale v. Adams, 884 Ill. 491. The decree is affirmed.

DECREE AFFIRMED.

O'Donnor, P.J., and Ketchett, C., concur.

41588

ELIZABETH WICKERATH, also known as
ELIZABETH UNHOCH,

Appellant,

v.

THE WESTERN AND SOUTHERN LIFE
INSURANCE CO., INC., and ANTHONY
UNHOCH, Administrator of the Estate
of JOHN A. UNHOCH, Deceased,
Appellees.

310 I.A. 266

APPEAL FROM

MUNICIPAL COURT,

COOK COUNTY,

Chicago.

Feb. 14. 4-30-41

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In a suit based on insurance policy No. 11735204, issued by defendant to John A. Unhoch July 19, 1937, for the sum of \$500, the statement of claim and affidavits of merits disclose two claimants as beneficiary and a counterclaim by defendant for \$366.89. The respective claimants were Elizabeth Wickerath (also known as Elizabeth Unhoch) and Anthony Unhoch, administrator of the estate of John A. Unhoch, deceased. On trial by the court there was a finding in favor of the administrator of the estate and against plaintiff, Elizabeth Wickerath, and also in favor of the defendant on its counterclaim, with judgments, from which plaintiff has appealed.

There is practically no dispute as to the facts. John A. Unhoch was an agent of the defendant insurance company. July 19, 1937, defendant issued to him a life insurance policy for the sum of \$500, on which all premiums have been paid. He died on the 8th day of September, 1939.

On the face of the policy appears what is known as a "Facility of Payment" clause, as follows: "The Company may make any payment or allow any benefit provided for in this policy to any relative by blood or connection by marriage of the Insured, or to any person appearing to the Company to be equitably entitled thereto." There was also an "Incontestability" clause as follows: "After this policy shall have been in force during the lifetime of the insured for one year from its date, it shall be incontestable except

ELIZABETH WICKERATH, also known as
ELIZABETH UNHOCH,
Appellant,

THE WESTERN AND SOUTHERN LIFE
INSURANCE CO., INC., and ANTHONY
UNHOCH, Administrator of the Estate
of JOHN A. UNHOCH, Deceased,
Appellees.

APPEAL FROM
MUNICIPAL COURT,
COOK COUNTY.

MR. JUSTICE MATTHEW DELIVERED THE OPINION OF THE COURT.

In a suit based on insurance policy No. 1178304, issued by defendant to John A. Unhoch July 19, 1937, for the sum of \$500, the statement of claim and affidavit of merits disclose two claimants as beneficiary and a counterclaim by defendant for \$866.89. The respective claimants were Elizabeth Wickerath (also known as Elizabeth Unhoch) and Anthony Unhoch, administrator of the estate of John A. Unhoch, deceased. On trial by the court there was a finding in favor of the administrator of the estate and against plaintiff, Elizabeth Wickerath, and also in favor of the defendant on the counterclaim, with judgment, from which plaintiff has appealed.

There is practically no dispute as to the facts. John A. Unhoch was an agent of the defendant insurance company. July 19, 1937, defendant issued to him a life insurance policy for the sum of \$500, on which all premiums have been paid. He died on the 6th day of September, 1938.

On the face of the policy appears what is known as a "Facility of Payment" clause, as follows: "The Company may make any payment or allow any benefit provided for in this policy to any relative by blood or connection by marriage of the insured, or to any person appearing to the Company to be equitably entitled there-to." There was also an "Incontestability" clause as follows: "After this policy shall have been in force during the lifetime of the insured for one year from its date, it shall be incontestable except

for non-payment of premiums; but if the age of the insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age. The terms and conditions of this policy cannot be changed except by endorsement hereon signed by the Secretary." On the back of the policy is this clause: "Any and all provisions of this policy which are in conflict with the statutes of the state in which this policy is delivered are understood, declared and acknowledged to be amended to conform therewith." Underneath in larger type appears: "The space below is for endorsements. Endorsements are only binding when signed by the Secretary of the company." Below this and underneath a line extending across the full length of the back of the policy appears written (partly typewritten and partly in longhand): "Name of person to whom payment of death benefit is requested subject to all the terms and conditions of the policy. Name: Elizabeth Unhoch. Relationship: Wife. Age: 38. 7/19/37. R. C. Massa, Secretary."

John A. Unhoch at the time of his death was a widower. His wife Margaret died in the year 1934. At the time of his death he left him surviving two children, Clarence, 18 years of age, and Elizabeth, 16 years of age. Anthony Unhoch is the administrator of his estate. John A. Unhoch made the application for the issuance to him of the policy sued on. At the time of his death he was a soliciting agent for the defendant company. Among his duties was the collection of premium payments from policy holders. At the time of his death he was indebted to the defendant insurance company to the amount of \$366.89 on account of a deficiency in his collection account. This debt has not been paid.

The plaintiff, Elizabeth Wiockerath, met John Unhoch about May, 1935, and they became friends. They went out together, and sometime after the month of May he asked her to marry him. When she first met him she lived at 5932 Sangamon street and continued to live

for non-payment of premium; but if the policy had been
mistakenly, the amount payable hereunder shall be such as the premium
paid would have purchased at the correct age. The terms and con-
ditions of this policy cannot be changed except by endorsement here-
on signed by the Secretary." On the back of the policy is this
clause: "Any and all provisions of this policy which are in con-
flict with the statutes of the state in which this policy is delivered
are understood, declared and acknowledged to be amended to conform
therewith." Underneath in larger type appears: "The space below is
for endorsements. Endorsements are only binding when signed by the
Secretary of the company." Below this and underneath a line ex-
tending across the full length of the back of the policy appears
written (partly typewritten and partly in longhand): "In case of person
to whom payment of death benefit is requested subject to all the
terms and conditions of the policy. Name: Elizabeth Linnoch.
Relationship: Wife. Age: 38. Address: R. 1, Linnoch, Secretary."
John A. Linnoch at the time of his death was a bachelor. His
wife Margaret died in the year 1924. At the time of her death he
left him surviving two children, Florence, 17 years of age, and
Elizabeth, 16 years of age. Anthony Linnoch is the administrator of
his estate. John A. Linnoch made the application for the insurance to
him of the policy and on. At the time of his death he was
soliciting agent for the defendant company. Among his duties was the
collection of premium payments from policy holders. At the time of
his death he was indebted to the defendant insurance company to the
amount of \$368.88 on account of a delinquency in the collection of
count. This debt has not been paid.
The plaintiff, Elizabeth Linnoch, deceased, and John A. Linnoch, deceased,
May, 1925, and they became friends. They met at the time of
sometime after the month of May he asked her to marry him. She
first met him and lived at 5882 Sangamon street and continued to live

there until September, 1936. Together they signed a lease for 7148 Emerald avenue on September 1, 1937. She signed her name Elizabeth Wickerath, he signed his John Unhoch. On July 4, 1936, he again asked her to marry him, and she told him she was not living with her husband but had no divorce. He told her he would arrange to get a divorce for her. A divorce suit was filed but no decree had been procured at the time of his death. He lived with her from December, 1937, until the spring of 1938, when they had an argument and he moved out. He came back in the fall of 1938, and she saw him until March, 1939, after which she did not see him up to the time of his death. When she first met Unhoch he worked for a laundry and about the first of 1937, he began working for the defendant insurance company. She frankly told the court that she lived with Unhoch as his wife.

Defendant's affidavit of merits questions the right of Elizabeth Wickerath to maintain this suit because she was not and never had been the wife of the insured, and therefore had no insurable interest in his life. The evidence shows that the insured took out the policy. It was not taken out by the plaintiff. While she would not have had an insurable interest and could not have taken out a policy on his life, he had a perfect legal right to insure his own life for her benefit. This has been held by the Appellate and Supreme courts in many cases. Hawley v. The Aetna Life Ins. Co., 291 Ill. 28; Colgrove v. Lowe, 343 Ill. 360; Johnson et al. v. Van Epps, 14 Ill. App. 201; Wolen v. Metropolitan Life Ins. Co., 287 Ill. App. 415. This he did.

The controlling question in this case turns on the construction of the "Facility of Payment" clause of the policy. The administrator and the insurance company rely upon McDaniels v. The Western and Southern Life Ins. Co., 332 Ill. 603. In that case an industrial insurance policy contained a "Facility of Payment" clause similar to that contained in this policy. The policy was issued July 6, 1925. On August 1, 1925, a rider on a form provided by the

there until September, 1936. Together they signed a lease for 7148 Emerald Avenue on September 1, 1937. She signed her name Elizabeth Wickerath, he signed his John Unhoch. On July 4, 1938, he again asked her to marry him, and she told him she was not living with her husband but had no divorce. He told her he would arrange to get a divorce for her. A divorce suit was filed but no decree had been procured at the time of his death. He lived with her from December, 1937, until the spring of 1938, when they had an argument and he moved out. He came back in the fall of 1938, and she saw him until March, 1939, after which she did not see him up to the time of his death. When she first met Unhoch he worked for a laundry and about the first of 1937, he began working for the defendant insurance company. She frankly told the court that she lived with Unhoch as his wife.

Defendant's affidavit of merits questions the right of Elizabeth Wickerath to maintain this suit because she was not and never had been the wife of the insured, and therefore had no insurable interest in his life. The evidence shows that the insured took out the policy. It was not taken out by the plaintiff. While she would not have had an insurable interest and could not have taken out a policy on his life, he had a perfect legal right to insure his own life for her benefit. This has been held by the Appellate and Supreme courts in many cases. Howley v. The Astoria Life Ins. Co., 281 Ill. 33; Colgrove v. Lowe, 281 Ill. 383; Johnson et al. v. Van Epps, 14 Ill. App. 307; John v. Metropolitan Life Ins. Co., 287 Ill. App. 413. This is the

The controlling question in this case turns on the construction of the "Facility of Payment" clause of the policy. The administrator and the insurance company rely upon Kobayashi v. The Western and Southern Life Ins. Co., 232 Ill. 607. In that case an industrial insurance policy contained a "Facility of Payment" clause similar to that contained in this policy. The policy was issued July 6, 1925. On August 1, 1925, a rider on a form provided by the

insurance company was signed by the insured and attached to the policy. It read: "The undersigned, insured under policy No. 6,112,228 in the above company, hereby authorizes the said company to pay the amount of insurance due under said policy to Dora McDaniels, my niece. It is agreed that this authorization is not to vary in any way or alter the terms and conditions contained in said policy, especially the 'facility of payment' provision therein." The "Facility of Payment" clause was set out verbatim. Dora McDaniels, upon the death of the insured, demanded payment which was refused, and she sued. She recovered judgment in the Circuit court which was affirmed in the Appellate court. On writ of error to the Supreme court the judgments of the Circuit and Appellate courts were reversed. The opinion of the court points out that the "Facility of Payment" clause in an industrial policy is for the benefit of the insured in order to protect the insurance company, with the consent of the insured, against trifling but expensive litigation; that for that reason it provides that where the company has exercised its option this exercise will be a complete defense under the terms of the policy. The court said the question was whether the facts constituted the exercise of an option on behalf of the insurance company to pay the insurance, when matured, to Dora McDaniels. While defendant had a right under that clause to make her the beneficiary the Supreme court said it was clear from the language, nevertheless, the authorization, as a part of it, provided that it should not vary or in any way alter the terms and conditions contained in the "Facility of Payment" clause. If it did not vary the terms of that clause then the option to pay anyone other than Dora McDaniels still remained in the insurance company. The court said:

"The defendant in error has no right to sue unless she is the beneficiary and entitled to the fund. The fact that she was by the rider included among those to whom the insurer might pay the fund does not give her that right in the absence of the exercise in her behalf of the option resting in the company."

insurance company was signed by the insured and attached to the policy. It read: "The undersigned, insured under policy No. 6,112,388 in the above company, hereby authorizes the said company to pay the amount of insurance due under said policy to Dora McDaniel, my niece. It is agreed that this authorization is not to vary in any way or alter the terms and conditions contained in said policy, especially the 'facility of payment' provision therein." The "Facility of Payment" clause was set out verbatim. Dora McDaniel, upon the death of the insured, demanded payment which was refused and she sued. She recovered judgment in the Circuit court which was affirmed in the Appellate court. On writ of error to the Supreme court the judgments of the Circuit and Appellate courts were reversed. The opinion of the court points out that the "Facility of Payment" clause in an industrial policy is for the benefit of the insured in order to protect the insurance company, with the consent of the insured, against trifling but expensive litigation; that for that reason it provides that where the company has exercised its option this exercise will be a complete defense under the terms of the policy. The court said the question was whether the facts constituted the exercise of an option on behalf of the insurance company to pay the insurance, when warranted, to Dora McDaniel. While defendant had a right under that clause to make her the beneficiary the Supreme court said it was clear from the language, nevertheless, the authorization, as a part of it, provided that it should not vary or in any way alter the terms and conditions contained in the "Facility of Payment" clause. If it did not vary the terms of that clause then the option to pay anyone other than Dora McDaniel still remained in the insurance company. The court said:

"The defendant in error has no right to sue unless she is the beneficiary and entitled to the fund. The fact that she was by the rider included among those to whom the insurer might pay the fund does not give her that right in the absence of the exercise in her behalf of the option resting in the company."

The provisions of this policy are not in essence distinguishable from the McDaniels case. The facility of payment clause, here as there, gives to the insurance company an option to pay the proceeds of the policy to any person it may think equitably entitled thereto. We presume the law would require good faith, but this would seem to be the only limitation on the option. Was it the intention of the parties by the endorsement of the name of plaintiff as one to whom payment is requested to revoke the option and compel payment to her to the exclusion of all others? If such was the intention the language used is inapt. The endorsement itself adds the words "subject to all the terms and conditions of the policy." One of these terms and conditions is the option vested in the insurance company. Moreover, the endorsement shows only a "request" by the insured. There are no words which can be construed into a promise by the insurance company to comply with his request. The signature is simply "R. F. Massa, Secretary," a mere acknowledgment of notice of the request. The language of insurance contracts will in case of ambiguity be construed most strongly against the company. This, however, does not give to a court the right or power to make a contract for the parties which they have not made for themselves. If the insured desired and intended to have the proceeds of this policy paid to plaintiff and plaintiff only, he could have taken out a policy which would have accomplished that result. He was in the insurance business. It is fair to assume he was familiar with insurance contracts. The judgments of the trial court will be affirmed.

JUDGMENTS AFFIRMED.

O'Connor, P.J., and McSurely, J., concur.

The provisions of this policy are not in essence distinguishable from the McDaniel case. The facility of payment clause, here as there, gives to the insurance company an option to pay the proceeds of the policy to any person it may think equitably entitled thereto. We presume the law would require good faith, but this would seem to be the only limitation on the option. Was it the intention of the parties by the endorsement of the name of plaintiff as one to whom payment is requested to revoke the option and compel payment to her to the exclusion of all others? If such was the intention the language used is inadequate. The endorsement itself adds the words "subject to all the terms and conditions of the policy." One of these terms and conditions is the option vested in the insurance company. Moreover, the endorsement shows only a "request" by the insured. There are no words which can be construed into a promise by the insurance company to comply with his request. The signature is simply "R. F. Masses, Secretary," a mere acknowledgment of notice of the request. The language of insurance contracts will in case of ambiguity be construed most strongly against the company. This, however, does not give to a court the right or power to make a contract for the parties which they have not made for themselves. If the insured desired and intended to have the proceeds of this policy paid to plaintiff and plaintiff only, he could have taken out a policy which would have accomplished that result. He was in the insurance business. It is fair to assume he was familiar with insurance contracts. The judgments of the trial court will be affirmed.

JUDGMENTS AFFIRMED.

O'Connor, F. J., and McDaniel, J., concur.

41735

310 I.A. 266²

RICHARD C. GILLESPIE,

Appellee,

v.

CHARLES WEISS and SAMUEL CINMAN,

Appellants.

INTERLOCUTORY APPEAL

FROM SUPERIOR COURT

COOK COUNTY.

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

Defendants Charles Weiss and Samuel Cinman bring this interlocutory appeal from two orders entered in the Superior Court in favor of plaintiff Richard C. Gillespie and against said defendants, one order being an order of the chancellor of the Superior Court of Cook County directing a temporary injunction to issue against the defendants and the other order denies defendants' motion to dissolve the injunction.

Complaint was filed in the Superior Court against the said defendants alleging the existence of a partnership between plaintiff and defendant Charles Weiss and a breach of partnership duty by the defendant; that Sam Cinman claims to have some right, title or interest in the said partnership and therefore, was made a party to the suit.

The prayer of the complaint contained the following:

- (1) For an injunction restraining both defendants from transferring any partnership assets and from transacting "any further business on behalf of the said partnership until further order of the Court";
- (2) For an accounting of partnership assets;
- (3) For a decree of dissolution of the partnership and distribution of the assets.

The complaint also alleged that the defendant Charles Weiss entered into a partnership agreement on December 14, 1940, for the operation and conduct of a real estate subdivision and development business known as City Housing Organization, located at 7243 Grand Avenue, Elmwood Park, Illinois, and that plaintiff has faithfully performed all his duties.

8101A.288

41735

IN THE
COURT OF COOK COUNTY
JANUARY 1, 1940

RICHARD C. GILLISPIE,

Defendant,

v.

CHARLES WEISS and SAMUEL GILMAN,

Plaintiffs.

MR. JUSTICE JAMES M. GILMAN, PRESIDING IN THE COURT OF COOK COUNTY.

Defendants Charles Weiss and Samuel Gilman bring this

interlocutory appeal from two orders entered in the Superior Court

in favor of Plaintiff Richard C. Gillispie and against said

defendants, one order being an order of the transfer of the Superior

Court of Cook County directing a temporary injunction to issue

against the defendants and the other order denies defendants' motion

to dissolve the injunction.

Complaint was filed in the Superior Court against the said

defendants alleging the existence of a partnership between Plaintiff

and defendant Charles Weiss and a breach of partnership duty by the

defendant; that said Gilman claims to have some right, title or interest

in the said partnership and therefore, was made a party to the suit.

The prayer of the complaint contained the following:

(1) For an injunction restraining both defendants from

transferring any partnership assets and from transacting "any further

business on behalf of the said partnership until further order of the

Court";

(2) For an accounting of partnership assets;

(3) For a decree of dissolution of the partnership and

distribution of the assets.

The complaint also alleged that the defendants Charles Weiss

entered into a partnership agreement on December 15, 1936, for the

operation and conduct of a real estate subdivision in development

business known as City Housing Organization, located at 701 Grand

Avenue, Elmwood Park, Illinois, and that Plaintiff has lawfully

performed all his duties.

The complaint sets forth the assets of the partnership as (a) an option dated November 20, 1940, between defendant Charles Weiss and McIntosh-Smith & Company, granting Charles Weiss an option for seven months to purchase certain real estate, the option to be extended for six months provided Charles Weiss purchased and paid for 50 lots; (b) accounts receivable represented by sales of lots by both partners; (c) stationery office supplies, office equipment; (d) good will.

The complaint further alleges that the conduct of the defendant Charles Weiss prejudiced the continuance of the business for the reasons:

(a) It became known to the complainant herein that the said defendant, without the knowledge and consent of the said complainant, sold the entire building and construction rights of the business for a large sum of money to one Sam Cinman who claims an interest in the said business as the "building contractor".

(b) The defendant removed partnership records from the office files without plaintiff's consent.

(c) The defendant collected large sums of money from purchasers of lots and appropriated the money to his own use.

It is further alleged in the complaint that Charles Weiss wilfully and persistently committed "breaches of the partnership" and so conducted himself that it is not reasonably practical to carry on the partnership business; that the defendant's persistent conduct, objected to by the plaintiff, has caused the plaintiff to be ill and mentally and physically unfit to devote his best efforts to the partnership business; that defendant's conduct is part of a wilful, malicious plan to force the plaintiff to surrender and forfeit his interest in the partnership; that plaintiff and defendant have had many disagreements, through no fault of plaintiff, and continuance of the partnership is unreasonable and inequitable.

The complaint further alleges that unless a decree of dissolution is entered, an accounting taken, and an injunction issued without notice or bond, restraining Charles Weiss from "transferring,

The complaint sets forth the facts of the partnership as (a) an option dated November 20, 1940, between defendant Charles and McIntosh-Smith & Company, granting Charles also an option for seven months to purchase certain real estate, the option to be extended for six months provided Charles pay purchase and sale for 60 lots; (b) accounts receivable represented by sales of lots by both partners; (c) stationary office supplies, office equipment; (d) good will.

The complaint further alleges that the conduct of the defendant Charles has prejudiced the continuance of the business for

the reasons:

(a) It became known to the complainant herein that the said defendant, without the knowledge and consent of the said complainant, sold the entire building and construction rights of the business for a large sum of money to one William who claims an interest in the said business as the "building contractor".

(b) The defendant removed partnership property from the office files without plaintiff's consent.

(c) The defendant collected large sums of money from purchasers of lots and appropriated the money to his own use.

It is further alleged in the complaint that Charles has willfully and deliberately committed "breaches of the partnership" and so conducted himself that it is not reasonably expected to carry on the partnership business; that the defendant's conduct has caused the partnership to be objected to by the plaintiff; has caused the plaintiff to be financially and physically unable to devote his best efforts to the partnership business; that defendant's conduct is a breach of the partnership plan to force the plaintiff to surrender and forfeit all interest in the partnership; that plaintiff and defendant have had many disagreements, through no fault of plaintiff, and continuance of the partnership is unreasonable and impractical.

The complaint further alleges that defendant has caused the partnership to be entered, an accounting taken, and an injunction issued, without notice or bond, restraining Charles from "operating,"

assigning, disposing of or encumbering the partnership assets, or transacting any further business on behalf of the partnership until the further order of the court", the plaintiff will be irreparably injured.

One has but to read the complaint to instantly see that the allegations therein are not a sufficient statement of facts upon which to base the issuance of an injunction. ^{sufficient} No facts are set up showing any threats have been made or that plaintiff has any fears that he shall suffer any injury. The fact that an injunction was issued restraining the partners who are engaged in a going business from continuing, is not preserving a status, but, on the contrary, the effect of it is in fact to make a change in the operation of the business. That is not one of the proper functions of the preliminary injunctional order such as this.

The answers which were filed deny all the material allegations of the complaint and it does not appear anywhere in the pleadings but that the plaintiff can obtain ample relief after a hearing is had. No charge of insolvency is made and nothing appears showing that the plaintiff was denied any so-called "rights", so it follows that the issuance of the injunction was improvident and failure to dissolve it was error.

For the reasons herein given the orders of the Superior Court appealed from are hereby reversed and the cause is remanded with directions to dissolve the injunction at plaintiff's costs.

ORDERS REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

HEBEL, P.J. AND BURKE, J. CONCUR.

assigning, disposing of or conveying the property, or transacting any business, or doing any act, until the further order of the court, the plaintiff will be irreparably

injured.

One has but to read the complaint to be instantly so

the allegations therein are not a sufficient statement of facts upon

sufficient which to base the issuance of an injunction. No facts are set out

showing any threats have been made or that injury has been done

that he shall suffer any injury. The fact that an injunction was

issued restraining the persons who are engaged in a business

from continuing, is not preserving a status quo, but, on the contrary,

the effect of it is in fact to make a change in the operation of the

business. That is not one of the proper functions of the preliminary

injunctional order such as this.

The answers which were filed deny all the material allegations

of the complaint and it does not appear anywhere in the answers but

that the plaintiff can obtain relief without making it red.

No charge of negligence is made and nothing is said to convince that the

plaintiff has been any so-called "wronged," as is alleged that the

issuance of the injunction was improper and that he is entitled to

it as a matter of course.

For the reasons herein stated the motion of the plaintiff

Court referred from me hereby reversed and the order is hereby

with directions to dissolve the injunction and to pay the costs of the

case to the defendant.

W. J. ...

41394

CHARLES F. ALEXANDER,

Appellant,

APPEAL FROM

v.

THE NORTHERN TRUST COMPANY, a corporation
not personally but as Trustee, under
Trust Agreement known as #11925, and
CARROL H. SUDLER, CARROL H. SUDLER, JR.,
and LOUIS C. SUDLER, partners under the
name and style of SUDLER & CO.,

CIRCUIT COURT

COOK COUNTY.

Appellees.

310 T.A. 384

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On October 2, 1939, Charles F. Alexander filed a complaint in the Circuit Court of Cook County for the recovery of the value of goods and chattels lost and destroyed through the alleged acts of the defendants or their agents, and for the return of certain rentals paid by him. Answers were filed by the defendants. The case was tried before the court without a jury, resulting in a finding and judgment against plaintiff. This appeal followed.

The evidence shows that on April 1, 1939, plaintiff entered into a written lease with the Northern Trust Company, as trustee, for Room 220 on the second floor of the building at 5 East Erie Street, Chicago. The lease covered the period from May 1, 1939, to April 30, 1940, and plaintiff agreed to pay rent at the rate of \$15.00 per month in advance on the first of each month. Defendants, Sudler & Company, were agents of the trustee. Carl Witte was an employee of Sudler & Company and the janitor of the premises. In the leased premises plaintiff carried on the business of making and distributing auto routing charts. Prior to September 1, 1939, plaintiff talked to an agent of Sudler & Company and advised him that plaintiff and James J. Callen had concluded an arrangement under which the latter was to carry on the sales and promotional work for the chart business, and asked the agent to cancel the lease and to enter into a new lease for the premises with Callen. The agent advised plaintiff that he would agree to an assignment of the lease, but would not cancel it. On Tuesday, September 5, 1939, Salvador Segreto, a cartage man, at the request of

CHARLES E. ALLEN

THE NORTHERN TRUST COMPANY, a corporation
not personally but as Trustee, under
Trust Agreement known as 1102B, and
CAROL H. SUDLER, CAROL H. SUDLER, JR.,
and LOUIS G. SUDLER, partners under the
partnership of SUDLER, JR.,

Chicago, Ill.

8101 A. 284

MR. JAMES T. ALLEN, JR.,

On October 2, 1932, Chicago, Ill.

in the Circuit Court of Cook County for the recovery of the value of
goods and chattels lost and destroyed through the alleged care of the
defendants on their agents, and for the return of certain rentals
said by him. Answers were filed by the defendants. The case was
tried before the court without a jury, resulting in a finding of
judgment against plaintiff. The case was affirmed.

The evidence shows that on April 1, 1932, plaintiff entered
into a written lease with the Northern Trust Company, for
Room 220 on the second floor of the building at 1102 B, Chicago.
The lease covered the period from April 1, 1932, to April 1,
1940, and plaintiff agreed to pay rent at the rate of \$100.00 per month
in advance on the first of each month. When one, other agency,
were agents of the trust. It is also a matter of record
Gomany and the Junior or the Senior. In the lease to the
till carried on the business of which and distribution of profits
charter. Prior to September 1, 1932, plaintiff was a partner in
Sudler & Gomany and advised plaintiff in a letter dated September 1,
had concluded an arrangement under which the trust would
the lease and promotional work for the trust would be
agent to cancel the lease and to enter into a new lease
with the trust. The agent advised plaintiff that he would
assignment of the lease, but could not cancel it. On
September 2, 1932, plaintiff wrote a letter to the trust

plaintiff, or Callan, or both, went to the premises to estimate the job of moving personal property therein located, to 68 West Illinois Street, Chicago. Segreto testified that he was hired by plaintiff and Callan and that they agreed with him about the price. Plaintiff denied he was present when Segreto was hired. Segreto testified that he moved everything in the place; that he moved shelving, books and all kinds of charts and odds and ends; that he had a man helping him; that when he finished, his truck contained half a load; that when he finished, the place was bare with the exception of scrap paper on the floor and that he was the last man out of the room. Alexander testified that he was there after the mover left and that when he went out he, Alexander, locked the door. The janitor testified that he was present at the time of the moving and that everything was moved out with the exception of scrap paper on the floor, and that the door remained unlocked for four days, when he caused the lock to be changed; that he swept the floor and there was nothing but scrap paper there and nothing of value and that he told a pedler named Sam Peters to haul it away, which he did. Plaintiff maintains that he sold certain of his personal property to Callan and that the property so sold to Callan was removed by Segreto on September 5, 1939. He insists that the evidence shows that at the time Segreto so moved certain chattels plaintiff intended to and did continue in business in that location, and that at the time Segreto moved the chattels, there remained in the premises the following property of the plaintiff: Five sets of paste-up discs for auto routing charts; fifty sets of planograph master drawings; miscellaneous correspondence and a supply of printed discs for the making up of the Indianapolis auto chart. Plaintiff asserts that the evidence shows that the defendant made a wrongful entry upon the premises, resulting in the plaintiff being deprived of the chattels so listed, and that the defendants should be required to respond in damages for the value of the property, and also be required to return to him that part of the rent for the month of December covering the period following such wrongful entry.

plaintiff, or Galian, or both, went to the premises to estimate the job of moving personal property therein located, to the east Illinois Street, Chicago. Negro testified that he was hired by plaintiff and Galian and that they agreed with him about the extent. Plaintiff denied he was present when Negro was hired. Negro testified that he moved everything in the place; that he moved shelving, books and all kinds of charts and odds and ends; that he had a man helping him; that when he finished, his truck contained half a load; that when he finished, the place was bare with the exception of some papers on the floor and that he was the last man out of the room. Alexander testified that he was there after the cover left and that when he went out he, at the time of the moving and that everything was moved out with the exception of some papers on the floor, and that the door remained un-locked for four days, when he caused the lock to be changed; that he swept the floor and there was nothing but some paper there and nothing of value and that he told a dealer named Sam Peters to haul it away, which he did. Plaintiff testified that he sold certain of his personal property to Galian and that he, Negro, to said to Galian was removed by Negro on September 6, 1939. He testified that the evidence shows that at the time Negro moved certain certain plaintiff intended to and did continue in business in that location, and that at the time Negro moved the chattels, there remained in the premises the following property of the plaintiff: "five sets of books-up books, the only charts; fifty sets of photographs; certain drawings; miscell. papers correspondence and a number of printed pieces for the making up of the Indianapolis auto chart. Plaintiff also testified that the evidence shows that the defendant made a wrongful entry upon the premises, resulting in the plaintiff being deprived of the chattels as listed, and that the defendant should be required to account in damages for the loss of the property, and also be required to return to the plaintiff the rent for the month of December now due and also for following such wrongful entry.

Plaintiff states that the entry by a landlord on demised premises during the term of the lease while the tenant is in possession is a trespass, which will render the landlord liable for damages; that the defense of abandonment is an affirmative defense, and defendants are required to prove it by a preponderance of the evidence; that the question of abandonment is one of intention; that there is no abandonment unless the premises are left with the intention of not again resuming possession; that even if premises are abandoned by a tenant the landlord is required safely to care for property left on the premises by the tenant, and that the tenant's liability to pay rent is terminated when he is evicted by the landlord from the demised premises during the term. Defendants do not dispute any of these propositions. The evidence submitted was not complicated and the case was determined upon the credibility of the witnesses. No complaint is made that there were errors made in the admission or rejection of testimony. The trial judge saw and heard the witnesses. It was his province in the first instance to determine their credibility and the weight to be attached to the testimony of each witness. We have read the abstract and are convinced that the judgment is supported by the evidence, and that it is not against the manifest weight of the evidence.

Therefore, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

Plaintiff states that the entry by a landlord in a leasehold premises during the term of the lease while the tenant is in possession is a trespass, which will render the landlord liable for damages; that the defense of abandonment is an affirmative defense, and defendants are required to prove it by a preponderance of the evidence; that the question of abandonment is one of intention; that there is no abandonment unless the premises are left with the intention of not again resuming possession; that even if premises are abandoned by a tenant the landlord is required solely to care for property left on the premises by the tenant, and that the tenant's liability to pay rent is terminated when he is evicted by the landlord from the demised premises during the term. Defendants do not dispute any of these propositions. The evidence submitted was not complicated and the case was determined upon the credibility of the witnesses. No complaint is made that there were errors made in the admission or rejection of testimony. The trial judge saw and heard the witnesses. It was his province in the first instance to determine their credibility and the weight to be attached to the testimony of each witness. We have read the record and are convinced that the judgment is supported by the evidence, and that it is not against the manifest weight of the evidence.

Therefore, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT & COSTS.

RECORDED, 11. THE CIVIL & CRIMINAL COURT, 11. COOK COUNTY.

41136

GEORGE A. SCHMIDT, individually
and as trustee under the last
will and testament of WILLIAM
SCHMIDT, deceased,

v.

MARIE RUNGE et al.

GEORGE A. SCHMIDT, ROLAND D. WHITMAN,
CHARLES R. HOLTON and HERBERT R. TEWS,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

WILHELMINA GROSS and THE NORTHERN
TRUST COMPANY, a corporation, as
trustee under the last will and
testament of WILLIAM SCHMIDT,
deceased,

Appellants.

310 I.A. 384²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Wilhelmina Gross, granddaughter of William Schmidt, deceased, and Northern Trust Company, successor trustee under the last will and testament of William Schmidt, respondents herein, have prosecuted a joint appeal from two decrees of the Circuit court allowing George A. Schmidt, son of the testator and co-trustee with the Northern Trust Company, and Whitman, Holton & Tews, hereinafter for convenience referred to as Whitman, attorneys for the estate, certain fees respectively as trustee and attorneys for services rendered to the estate by George A. Schmidt, as trustee, and Whitman as attorney, as well as the allowance of master's costs and expenses incurred in a hearing on petitions filed by Schmidt and Whitman for the allowance of fees.

William Schmidt died December 12, 1924, leaving a last will and testament which was duly proved and admitted to probate, leaving substantially all his estate, consisting almost wholly of lands under lease to Riverview Park Company and a majority of the capital stock of that company, to State Bank of Chicago and his widow, Wilhelmina Schmidt, as trustees. Wilhelmina Schmidt died

S. H. Klarkowski

5-13-41

GEORGE A. SCHMIDT, individually
and as trustee under the last
will and testament of WILLIAM
SCHMIDT, deceased,

MARIE HUNTON, et al.

GEORGE A. SCHMIDT, ROBERT D. SCHMIDT,
CHARLES R. HUNTON and MARIE HUNTON, et al.,
Appellees.

WILLIAM A. GROSS and THE NORTHERN
TRUST COMPANY, a corporation, as
trustee under the last will and
testament of WILLIAM SCHMIDT,
deceased,

Appellants.

MR. PRESIDING JUSTICE RAYMOND DELIVERED THE OPINION OF THE COURT.

Wilhelmina Gross, granddaughter of William Schmidt,

deceased, and Northern Trust Company, successor trustee under the

last will and testament of William Schmidt, respondents herein,

have prosecuted a joint appeal from two decrees of the Circuit

Court allowing George A. Schmidt, son of the testator and

co-trustee with the Northern Trust Company, and William, son

& heirs, hereinafter for convenience referred to as William, George

heirs for the estate, certain fees respectively as trustee and

attorneys for services rendered to the estate by George A. Schmidt,

as trustee, and William as attorney, to sell the real estate of

master's costs and expenses incurred in a hearing on petition filed

by Schmidt and William for the division of the

William Schmidt died December 12, 1904, leaving a last

will and testament which was duly proved and admitted to probate,

leaving substantially all his estate, consisting also of a policy of

lands under lease to Liverpool Park Company and a portion of the

capital stock of that company, to State Bank of Chicago and his

widow, Wilhelmina Schmidt, as trustees. Wilhelmina Schmidt died

April 9, 1925, and under a provision of her husband's will George A. Schmidt, the testator's son, succeeded her as the individual trustee and has since continued to act in that capacity. The State Bank of Chicago and its successor, The Foreman-State Trust & Savings Bank, acted as co-trustee until May 31, 1935, when by decree of the Circuit court the Northern Trust Company was appointed as its successor.

It appears that in January, 1933, a receiver had been appointed for the Foreman-State Trust & Savings Bank, and in April of that year George A. Schmidt, individually and as trustee under his father's will, filed a bill of complaint in the Circuit court which asked for the construction of an ambiguity in the will; for the court's direction to the trustee in relation to the trustees future conduct pertaining to the charging of certain expenses to the income or principal of the estate and continuation of titles to real estate; for proper allowance of trustees' fees and fees for the attorneys representing the estate; for the approval of the accounts of complainant and of the retiring trustee and its receiver; for a discharge of the retiring trustee from further liability for fees; for an adjudication that the complainant and the incoming successor trustee **should** not be required to search out other assets beyond those delivered into their hands, or assert a claim therefor; for the approval of the conduct of the existing trustees throughout their administration of the estate; and for such other and further relief as the nature of the case might require.

On May 31, 1935, a decree was entered on the foregoing complaint which adjudicated the ambiguity relating to the appointment of a successor to the Foreman-State Trust & Savings Bank as trustee, and designating the Northern Trust Company as the corporate successor and co-trustee with George A. Schmidt; finding that the solicitors for George A. Schmidt had examined the accounts of

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State Bank of Chicago and its successors, the Northern Trust
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A. Schmidt, the late son, was appointed the individual
April 3, 1925, and under a will dated April 3, 1925, and under a will dated

[illegible]

the outgoing trustee and had carried on negotiations resulting in the settlement of its accounts; finding that it was essential and to the best interests of the trust estate and to the persons having an interest therein to file the complaint for the construction of the will of William Schmidt and the appointment of a successor-trustee; that the fees, costs and expenses of the complainant, including his reasonable attorneys' fees in connection with or incidental to the institution and prosecution of the cause, the examination of accounts and the negotiations resulting in the settlement thereof, were properly chargeable against and payable from the principal of the trust estate by the successor trustee then appointed; that the complainant and defendants named in the complaint were all the persons and corporations which had or under any contingency might have any interest in the trust estate under the will of William Schmidt; and fixing the fees of the guardian ad litem for the three minor children of Wilhelmina Gross for services rendered by him at \$100. With reference to the question of fees for George A. Schmidt, the individual trustee, and Whitman, for legal services rendered to the trustees in the administration of the trust estate, the decree found that Schmidt had never requested any compensation for his services as trustee under his father's will, but contended that he was entitled to fees, and that Whitman likewise had a claim for legal services rendered to the trustees outside of services rendered in that proceeding; that the statement of account filed by the receiver for the Foreman-State Trust & Savings Bank did not take into account Schmidt's claim for past services as trustee, nor Whitman's claim for past legal services rendered to the trustees in the administration of the estate, and that "the approval by this decree of said statement of account (of the outgoing trustee) is without prejudice to the aforesaid claims of George A. Schmidt and of Helmer, Moulton, Whitman and Holton, for fees due them for services heretofore rendered as aforesaid." And the decree concluded by retaining jurisdiction in the court of

the outgoing trustee and the court in the settlement of the accounts; finding that it was essential and to the best interests of the estate and to the persons having an interest therein to fill the position for the continuation of the will of William Schmidt and the appointment of a successor-trustee; that the fees, costs and expenses of the complainant, including his reasonable attorney's fees in connection with or incidental to the investigation and preparation of the settlement thereof, were properly chargeable against and payable from the principal of the trust created by the testator trustee then appointed; that the complainant and respondent named in the complaint were all the persons who were or should be or under any contingency might have any interest in the trust set up under the will of William Schmidt; and finding the fees of the complainant and item for the three minor children of William Schmidt to be services rendered by them at \$100.00 each for the preparation of fees for George A. Schmidt, the individual trustee, and attorney for legal services rendered to the complainant in the administration of the trust estate, the above found and which have been included any compensation for his services as trustee under his father's will; but contended that he was entitled to fees, costs and expenses like-wise and a claim for legal services rendered to him in the settlement of his account filed by the trustees for the non-payment of the same; and that he did not take into account the claim for legal services as trustee, nor William's claim for legal services as trustee, and that the approval by this decree of said settlement of accounts for the outgoing trustee is without prejudice to the claim of the complainant, George A. Schmidt and of Helmer, Paulson, Ahlman and Olson, for fees due them for services not before mentioned as "outgoing" and the decree concluded by retaining jurisdiction in the court of

the subject matter and the parties "for any and all purposes incident to the further administration of said trust estate."

Although George A. Schmidt had been receiving as general manager of Riverview Park an annual salary of \$9,000, and \$1,500 for expenses, the testator evidently intended that his son should receive compensation out of the trust estate for services rendered as trustee in addition to any salary that might be paid to him as manager of the park, for he provided that "the trustees shall be paid a fair and just compensation out of the trust estate for their services hereunder, and shall also be allowed to employ such agents and attorneys as are reasonably necessary in managing and protecting the trust estate, and their compensation, as well as the reasonable and proper expenditures made or incurred by the trustees in administering the trust, shall be repaid and allowed to the trustees out of the trust estate." Because of the long and confidential relationship which had existed between him and Whitman, the testator expressed the wish that Whitman and his firm should be retained as attorneys for the estate in the following language: "Owing to the confidential relations existing between myself and Roland D. Whitman and his firm, and their familiarity with my properties and business affairs, I should personally approve their appointment as attorneys for my said executors and trustees."

Respondents were not unmindful of these provisions in the testator's will, and when Schmidt and Whitman filed their petitions for the allowance of fees, neither the Northern Trust Company nor Wilhelmina Gross in answers filed by them challenged the jurisdiction of the court to hear and adjudicate the question of fees claimed by Schmidt and Whitman, which is now urged as ground for reversal. The Northern Trust Company averred that it was not informed as to the facts alleged in the petitions with respect to the nature and extent of the services rendered, and therefore required strict proof thereof, but it asked the court to "determine what services, if any, have been

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rendered, and fix reasonable and customary charge for the same, and instruct it and its co-trustee, George A. Schmidt, in regard thereto." Wilhelmina Gross likewise required strict proof of the petitions, denied that the charges were reasonable, and that petitioners were entitled to any compensation, but made no averment challenging the jurisdiction of the court to hear and determine the question of fees. Under this state of the pleadings, it is difficult to understand any theory upon which respondents should now be permitted to contend, as they do, that the court had no jurisdiction to render the decrees appealed from. Their contention is predicated upon the ground that there was no cause pending before the court when the petition was filed, the decree having become final May 31, 1935, and they also assert that process was not had upon necessary parties in the cause. The first contention overlooks the state of the record made up by the pleadings, as well as the express provision in the decree wherein the court retained jurisdiction of the subject matter and the parties "for any and all purposes incident to the further administration of said trust estate." It is apparent from what we have said that the testator expressly provided for compensation to the trustees; that he expressed the wish that Whitman be retained as attorney for the estate, and thereby impliedly approved payment of fees to Whitman as counsel for any services rendered by him. Moreover, the decree found that both Schmidt and Whitman claimed fees as trustee and for legal services respectively, and that the account filed by the receiver for the Foreman-State Trust & Savings Bank did not take into account Schmidt's claim for past services as trustee nor Whitman's claim for legal services rendered in the administration of the estate, and it was provided that "the approval by this decree of such statement of account is without prejudice to the aforesaid claims of George A. Schmidt and of Helmer, Moulton, Whitman and Holton for fees due them for services rendered as aforesaid." It is therefore clear that when the decree was entered May 31, 1935, all the parties contemplated that the petitions of

rendered, and the responsible and attorney charges for the same, and instruct it and its co-trustee, George W. Smith, in regard thereto." "Wilhelmine Gross likewise retained a law firm to prepare petitions, denied that the charges were reasonable, and that petitioners were entitled to any compensation, but made no statement challenging the jurisdiction of the court to hear and determine the question of fees. Under this state of the pleadings, it is difficult to understand any theory upon which respondents should now be permitted to contend, as they do, that the court had no jurisdiction to render the decree appealed from. Their contention is predicated upon the ground that there was no cause pending before the court when the petition was filed, the decree having become final May 31, 1935, and they also assert that process was not had upon necessary parties in the case. The first contention overlooks the state of the record made up by the pleadings, as well as the express provision in the decree wherein the court retained jurisdiction of the subject matter and the parties "for any and all purposes relating to the further administration of said trust estate." It is apparent from what we have said that the testator expressly provided for compensation to the trustees; that he expressed the wish that William be retained as attorney for the estate, and thereby implicitly approved payment of fees to William as counsel for only a private claimant. Moreover, the decree found that both parties and William claimed a fee as trustee and for legal services he provided, and that the account filed by the trustee for the same was correct. It is not taken into account William's claim for past services as trustee nor William's claim for legal services rendered in the administration of the estate, and it was provided that the approval by this decree of said statement of account is without prejudice to the aforesaid claims of George W. Smith and of William, Hamilton, William and John for fees and charges for services rendered as aforesaid." It is therefore clear that the decree was entered May 31, 1935, and the parties' contentions in the petition of

Schmidt and Whitman for fees should be adjudicated at some future time, and neither of the respondents in their answers questioned the right of petitioners to fees.

Aside from these considerations there is the well established rule that in addition to their general and inherent jurisdiction over trusts, and actions to establish and enforce the same, courts of equity have the right to execute a supervisory control over trustees, and their jurisdiction is generally deemed to be exclusive. A trustee appointed by a court of equity is particularly within its control and subject to its decrees, to the exclusion of all other courts, including courts possessing concurrent equitable jurisdiction. (65 Corpus Juris, sec. 538, pp. 676, 677.)

The contention that "all necessary parties have not been served in this cause," is untenable. This contention is predicated on the fact that the three minor children of Mrs. Gross were not made parties to the bill of complaint. Under the provisions of the will Mrs. Gross received the income from one-half of the estate by way of a spendthrift trust, and the principal of the trust was not subject to distribution until her death. There was no remainder, vested, contingent or otherwise, in the minor children. The entire right of distribution of her share of the estate was left with Mrs. Gross, who might will it to whom she pleased or allow it to be distributed under the statute of descent. As a precaution, however, the court did appoint a guardian ad litem for the three minor children, who were thereby represented in the proceeding.

It is next urged that the fees allowed to the master are excessive. It should be pointed out that the record made up before the master consisted of some 1,500 pages of evidence. He certified to the taking of 2,809 folios of oral and documentary evidence, at the statutory rate of 15¢ per folio, aggregating \$421.35. No question was raised as to the correctness of the number of folios and the fee having been fixed at the statutory rate, this item of master's

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It is next urged that the fee allowed to the petitioner is excessive. It should be pointed out that the record case up before the master consisted of some 1,500 pages of evidence. It will be to the taking of 2,500 folios of oral and documentary evidence, at the statutory rate of 1 1/2 per folio, aggregating \$41.25. No question was raised as to the correctness of the number of folios and the fee having been fixed at the statutory rate, this item of master's

fees is not here reviewable. The balance of the master's fees allowed amounts to \$2,790. His certificate shows that his services consisted of the usual duties devolving upon a master in a sharply litigated proceeding, for which he furnished a detailed statement which was filed by him as part of his report. This statement was before the court at the time of the entry of the order, and since no objection was raised to these fees it was unnecessary for the court to hear further evidence. If respondents had considered these charges excessive, it was their privilege to object thereto and submit the matter to the chancellor for his consideration. No objection having been interposed to the amount allowed the master, respondents are not now entitled to raise or have the matter of fees reviewed on appeal.

With respect to the fees claimed by Whitman the master recommended the allowance of \$13,925, but the chancellor reduced this item to \$11,500. Respondents do not seriously dispute the amount awarded to Whitman. They admit that the services for which compensation is asked were in fact rendered. Their principal contention is that "the larger portion of those services were, in fact, rendered for or in the interest of persons other than the trust estate," and that "many of those services were not necessary to and did not benefit the trust estate and were not legal in their nature." The report of proceedings of the trial judge in the matter of the two petitions shows that in the course of argument before the chancellor as to the amount of Whitman's fees, counsel for Wilhelmina and Nels Gross stated to the court that "if said petitioners, Roland D. Whitman, Charles R. Holton and Herbert R. Tews, were to be allowed a fee for services rendered by them, that instead of \$13,925 allowed by said master in chancery in his report, he (counsel), thought that an allowance of \$10,000 would be a fair fee for the services rendered by said Roland D. Whitman, Charles R. Holton and Herbert R. Tews." This statement was made by counsel, without waiving his

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With respect to the fees claimed by William the master recommended the allowance of \$1,925, and the chancellor reduced this item to \$1,500. Respondents do not seriously dispute the amount awarded to William. They admit that the services for which compensation is asked were in fact rendered. Their principal contention is that "the larger portion of those services were, in fact, rendered for or in the interest of persons other than the trust estate," and that "many of those services were not necessary to and did not benefit the trust estate and were not legal in their nature." The report of proceedings of the trial judge in the matter of the two petitions shows that in the course of argument before the chancellor as to the amount of William's fees, counsel for William and Neil Gross stated to the court that "all said petitioners, Roland D. Whitman, Charles H. Holton and Herbert R. Lewis, were to be allowed a fee for services rendered by them, that instead of \$1,925 allowed by said master in chancery in his report, he (counsel), thought that an allowance of \$10,000 would be a fair fee for the services rendered by said Roland D. Whitman, Charles H. Holton and Herbert R. Lewis." This statement was made by counsel, without waiving his

point as to the jurisdictional question, and counsel's argument was formally adopted by the respondent, Northern Trust Company, as trustee. A detailed analysis of the services rendered by Whitman would unduly extend this opinion beyond reasonable bounds, but in view of the concession by counsel for respondents that the services for which compensation is asked were in fact rendered, and that \$10,000 would be a fair fee, we deem it unnecessary to enter into a lengthy discussion of the matter. The chancellor has reduced the fee from the amount recommended by the master to \$11,500, which is only \$1,500 more than counsel concede to be a reasonable one. Attached to Whitman's petition for fees are several exhibits, showing in detail the character and extent of services rendered by him and his firm on behalf of the trustees in the administration of the estate, giving the time necessarily spent in the disposition of each item. The services are of a varied character and cover a period of many years. The itemized statement in evidence extends over 28 pages of the abstract of record. We have carefully examined Whitman's petition, the exhibits attached thereto, and the evidence adduced in support thereof, showing the sequence of events in the administration of this estate and it seems to us that the award of fees to Whitman is amply supported by the record. Respondents contend but do not argue extensively that some of the legal services were rendered primarily for the Riverview Park Company, whose attorney Whitman was during all the period in question. While it is true that Whitman represented the Riverview Park and the Schmidt interests, the services claimed and for which the award was made are shown in detail, through voluminous testimony adduced by Whitman, to have been rendered for the trustees in the administration of the estate, and we have reached the conclusion that the amount allowed is not unreasonable. Wilhelmina Gross objected to the retention of Whitman as attorney for the trustees and retained her own counsel to represent her. It was contended that Whitman was antagonistic to

point as to the jurisdictional question, and counsel's argument was formally adopted by the respondent, Northern Trust Company, as trustee. A detailed analysis of the services rendered by Whitman would unduly extend this opinion beyond reasonable bounds, but in view of the concession by counsel for respondents that the services for which compensation is asked were in fact rendered, and that \$10,000 would be a fair fee, we deem it unnecessary to enter into a lengthy discussion of the matter. The chancellor has reduced the fee from the amount recommended by the master to \$11,500, which is only \$1,500 more than counsel concedes to be a reasonable one. Attached to Whitman's petition for fees are several exhibits, showing in detail the character and extent of services rendered by him and his firm on behalf of the trustees in the administration of the estate, giving the times necessarily spent in the disposition of each item. The services are of a varied character and cover a period of many years. The itemized statement in evidence extends over 28 pages of the abstract of record. We have carefully examined Whitman's petition, the exhibits attached thereto, and the evidence adduced in support thereof, showing the sequence of events in the administration of this estate and it seems to us that the award of fees to Whitman is amply supported by the record. Respondents contend but do not argue extensively that some of the legal services were rendered primarily for the Riverview Park Company, whose attorney Whitman was during all the period in question. While it is true that Whitman represented the Riverview Park and the adjacent interests, the services claimed and for which the award was made are shown in detail, through voluminous exhibits adduced by Whitman, to have been rendered for the trustees in the administration of the estate, and we have reached the conclusion that the award allowed is not unreasonable. Whitman Gross objected to the retention of Whitman as attorney for the trustees and retained her own counsel to represent her. It was contended that Whitman was antagonistic to

her, and that the estate was "over lawyerized," but the evidence does not support these charges. Whitman had for years represented William Schmidt individually, and the testator expressed the wish in his will that he be retained to represent the estate. He was, through years of association with Schmidt, familiar with his affairs, and the wish of the testator that he be retained was a natural expression of confidence in him.

With respect to the fees claimed by George A. Schmidt as trustee, respondents raise the jurisdictional question which has already been discussed, and in addition thereto they say that Schmidt's services were so commingled with his duties as president and general manager of Riverview Park Company that it would be inequitable and unjust to allow him fees as trustee in addition to the compensation that he received as president and general manager of the park; that Schmidt had and served interests adverse to the other beneficiaries of the trust estate; and that as the individual cotrustee he is entitled to no more than nominal compensation,

Because the very life of the estate depended upon the continued successful operation of Riverview Park as an amusement park under the management and control of the trustees of the estate, Schmidt's services as president and general manager of the park were necessarily tied up with the management of the estate, which consisted of an undivided three-fourths interest in the land on which Riverview Park is located and 546 shares out of a total of 1,000 shares outstanding of Riverview Park Company, a corporation, as well as miscellaneous securities of an approximate value of \$50,000. If the park was successfully operated and yielded dividends, as it did through most of the years, the estate profited thereby. William Schmidt's entire estate at the time of the hearing was valued at about \$1,500,000. Riverview Park is an amusement center located at Western and Belmont avenues, Chicago, and is operated by the Riverview Park Company. The real estate on which the park stands is leased by the company. The one-fourth interest in the

her, and that the estate was "over-lawyered," but the said one does not support these charges. William had for years represented William Schmidt individually, and the testator expressed the wish in his will that he be retained to represent the estate. He was, through years of association with Schmidt, familiar with his affairs, and the wish of the testator that he be retained was a natural expression of confidence in him.

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real estate which is not owned by the Schmidt estate belongs to the estate of William F. Merle, deceased. Of the 1,000 shares of stock of Riverview Park Company 546 shares are owned by the Schmidt estate, 347 by the Merle estate and 102 shares by George A. Schmidt, individually. The testator evidently realized that the value of the estate would depend upon the successful operation of the park and made his will with that in view. After naming his widow and the State Bank of Chicago co-trustees under his will and providing for the succession of George in the event of his widow's death, the testator directed the trustees to pay a small annuity to Marie Runge, a household servant, and upon the death of his wife to pay one-half of the remaining net income to his son George until January 2, 1936, when he was to become entitled absolutely to one-half of the principal of the trust estate less such amount as would be required to provide the annuity to Marie Runge. He then directed that the other one-half of the net income from the estate be paid to Wilhelmina Gross, testator's granddaughter, one of the respondents herein, for and during her life, and upon her death the principal remaining after payment of George A. Schmidt's one-half on January 2, 1936, was to be paid over to the estate of Wilhelmina Gross, who at the time of the making of the will was about to marry Nels Gross, then later married him and is now the mother of three minor children for whom a guardian ad litem was appointed. When the testator's will was drawn February 10, 1923, he had recently emerged from an unsuccessful assault upon his estate, in which the Merle minority interests had sought to gain control of the Riverview Park Company, and the testator evidently took precaution against any possible recurrence of such a conflict after his death. His son, George A. Schmidt, had been associated with Riverview Park for thirty years, first as director and secretary of the company, later as assistant manager and director, and from 1912 on as general manager of the park. Since 1925 he has been president of the company. During most of this period he had shared the manage-

real estate which is not owned by the defendant state belongs to the estate of William F. Herie, deceased. Of the 1,000 shares of stock of Riverview Park Company 740 shares are owned by the defendant state, 260 by the Herie estate and 100 shares by George A. Schmidt, individually. The testator evidently realized that the value of the estate would depend upon the successful operation of the park and made his will with that in view. For many years the widow and the state bank of Ohio, as co-trustees under his will and providing for the succession of George in the event of his death, made the testator directed the trustees to pay a small annuity to Marie Hunge, a household servant, and upon the death of his wife to pay one-half of the remaining net income to his son George until January 2, 1936, when he was to become entitled absolutely to one-half of the principal of the trust estate less such amount as would be required to provide the annuity to Marie Hunge. He then directed that the other one-half of the net income from the estate be paid to Wilhelmina Gross, testator's granddaughter, one of the respondents herein, for and during her life and upon her death the principal remaining after payment of George A. Schmidt's one-half on January 2, 1936, was to be paid over to the estate of Wilhelmina Gross, and at the time of the making of the will was about 20 years old. She later married him and is now the mother of three minor children for whom a guardian ad litem was appointed. When the testator's will was drawn February 10, 1933, he had recently emerged from an unsuccessful lawsuit upon his estate, in which the Marie minority interest and sought to gain control of the Riverview Park Company, and the testator obviously was in position against any possible recurrence of such conflict after his death. His son, George A. Schmidt, had been associated with Riverview Park for thirty years, first as director and now, since 1921, company, later as assistant manager and director, and from 1921 on as general manager of the park. Since 1927 he has been president of the company. During most of this period he was also the manager

ment of the enterprise with his father, who had ample opportunity to observe his son's capacity for the responsibilities entrusted to him, and in his will he gave clear expression to his belief that full personal control of the park company by his son would not prove harmful to the remaining undistributed one-half. He provided for his succession as individual trustee, and directed that "fair and just compensation out of the trust estate," be paid to the trustees for their services, and inserted a direction in his will "that my son, George Alvin Schmidt shall continue to have the general management of Riverview Park so long as he desires and maintains his qualifications for such management."

Wilhelmina Gross, on the other hand, was young, inexperienced and unfamiliar with the park business, and it was evidently for this reason that he made provision by way of a spendthrift trust for Wilhelmina, which provided that in no event should distribution of the principal ever be made to her.

The record is replete with evidence disclosing "a continuous conflict between Wilhelmina Gross and petitioner (Schmidt), Mrs. Gross complaining of petitioner's income from the park company as a bar to his application for trustee's fees, and complaining of his actions as trustee and threatening him with removal." (Master's report.) However, a careful examination of the record fails to disclose any substantial merit to Mrs. Gross's charges. The testator respoeded particular confidence in his son, as well as Whitman, and the evidence pertaining to the services rendered by George A. Schmidt convinced both the master and chancellor that these charges were unfounded.

In the exhaustive report filed by the master who had taken voluminous testimony and had evidently devoted himself painstakingly to the findings of fact based upon the evidence, the master listed and described numerous items of services rendered by Schmidt over the period from April 9, 1925, to June 8, 1935, which may be briefly

ment of the enterprise with his father, who was under opportunity to observe his son's capacity for the responsibility and entrusted to him, and in his will he gave clear expression to his belief that full personal control of the bank company by his son would not prove harmful to the remaining unincorporated one-half. He provided for his succession as individual trustee, and directed that "this and just compensation out of the trust estate," be paid to the trustees for their services, and inserted a disposition in his will "that my son, George Edwin Whitman, should continue to have the general management of the bank so long as he feels and maintains his qualifications for such management."

William Gross, on the other hand, was young, inexperienced and unfamiliar with the bank business, and it was evidently for this reason that he made provision by way of a general trust for William, which provided that in no event should disposition of the principal ever be made to her.

The record is replete with evidence indicating "a continuous conflict between William Gross and William (John), and Gross complaining of William's conduct from the bank company as a bar to his application for success's place, and complaining of his actions as trustee and transferring him also removal." (Master's report.) However, a careful examination of the record fails to disclose any substantial basis to Mrs. Gross's charges. The testator responded positively to the charges in his will, as well as Whitman, and the evidence pertaining to the various charges by George A. Whitman convinced both the Master and Chancellor that those charges were unfounded.

In the extensive report filed by the Master in the above voluminous testimony and had extremely devoted his time and energy to the findings of fact based upon the evidence, and he stated and described numerous items of services rendered by him over the period from April 2, 1925, to June 8, 1925, which may be briefly

summarized as follows: In the spring of 1925 the Board of Education of Chicago instituted proceedings to condemn the park premises and adjoining lands of the Schmidt trust for use as a school site. \$400,000 was offered by the board for the entire property. Schmidt held numerous conferences with a view to securing the dismissal of these proceedings, but could not get the Board of Education to agree. He therefore procured an elaborate appraisal of the park premises showing an aggregate value of \$4,000,000 and presented the same to the Board of Education and to the mayor, who became convinced that the property was too valuable for a school site, resulting in the dismissal of the condemnation suit in the fall of 1926.

In the fall of 1925 proceedings to widen and pave Western avenue in front of the park premises were instituted and an award was made for the portion of the park premises required by the city. Schmidt negotiated with the Board of Local Improvements for an increase in the award, and as a result in December, 1927, settled the matter for \$68,000, which was in excess of the amount assessed against the premises for the improvement.

In 1928 the Board of Education again served notice that it intended to condemn the park premises and adjacent lands for a school site. Through Schmidt's negotiations the Board of Education acquired lands adjoining the park which were suggested by Schmidt, and there constructed the Lane Technical High School.

In 1926 Schmidt negotiated a lease of two acres owned in its entirety by the Schmidt trust for use by the Riverview Park Company as an open air garage on a basis which netted the trust estate from \$1,000 to \$3,000 a year.

Early in 1927 Schmidt and the State Bank of Chicago as co-trustees negotiated for an extension of the lease for the Riverview Park Company from the Schmidt and Merle trusts, but were unable to get the Merle trust to agree on the terms. A partition suit was

of 1926.

in the fall of 1915, proceeding to the north and west, and
avenue in front of the bank premises were identified and a road
was made for the portion of the lot which was adjacent to the city.
Belmont negotiated with the Board of Local Improvement for an in-
crease in the ward, and as a result in January, 1917, received the
ward for \$6,000, which was in excess of the amount of the
against the ward, to be removed at

estate from \$1,000 to \$3,000 a year.

to get the knife went to get it on the ground. A position with the view Park Company from the office in their hands, but were unable to get the knife. For an attention of the Park Company in the view Park Company from the office in their hands, but were unable to get the knife. For an attention of the Park Company in the view Park Company from the office in their hands, but were unable to get the knife.

thereupon filed with a view to effecting the purchase by the Schmidt trust of the outstanding one-fourth interest owned by the Merle trust. This suit was prosecuted before a master in chancery wherein Schmidt attended numerous hearings and for which he gathered and furnished information required by counsel in the case. These proceedings were concluded in 1939 and a favorable report was received from the master. A purchase of the one-fourth interest of the Merle real estate was suggested and Schmidt carried on negotiations for a period of about a year and after some fifty conferences, frequently occupying an entire day, reduced the negotiations into the form of an agreement under which either party could either buy or sell at the price of \$2,150,000. The negotiations finally fell because the Merle trust refused to enter into the agreement.

In 1928 Schmidt appeared before the Board of Tax Appeals and lodged objections to the taxes against the real estate, which at that time were being fixed for a four-year period. He employed counsel, gathered data for determining values, and procured a reduction of approximately \$15,000 a year in taxes for four years.

Commencing in September, 1931, negotiations with the Merle trust were started for the purpose of securing a new lease from the land owners of the Riverview Park Company. These required the daily attendance of Schmidt at conferences until the lease was finally executed, in April, 1932. There were many difficult problems to be worked out in connection with securing the lease, which in its final form comprised twenty-two pages and called for an aggregate rental of \$980,000 over the fourteen-year period. Schmidt took an active part in these negotiations, together with the officers of the Foreman-State Trust & Savings Bank and Henry J. Merle.

In April, 1932, a fire destroyed an amusement building on the premises known as the "Bug House." Schmidt prepared appraisals and participated in negotiations for collection of the fire loss, which totaled \$79,000, and helped to arrange for the deposit of the

thereupon filed with a view to effecting the purchase of the Schmidt trust of the outstanding one-fourth interest owned by the Merle trust. This suit was prosecuted before a master in chancery wherein Schmidt attended numerous hearings and for which he gathered and furnished information relative to counsel in the case. These proceedings were concluded in 1932 and a favorable report was received from the master. A purchase of the one-fourth interest of the Merle real estate was suggested and Schmidt entered on negotiations for a period of about a year and after some fifty conferences, frequently occupying an entire day, reached the negotiations into the form of an agreement which Schmidt later could either buy or sell at the price of \$2,150,000. The negotiations finally fell because the Merle trust refused to enter into the agreement.

In 1933 Schmidt appeared before the Board of Tax Appeals and lodged objections to the taxes levied on the real estate, which at that time were being fixed for a four-year period. He employed counsel, gathered data for determining values, and procured a reduction of approximately \$15,000 a year in taxes for four years. On evening in September, 1933, negotiations with the Merle trust were started for the purpose of securing a new lease from the land owners of the Riverside Park property. These negotiations resulted in an agreement of settlement at conference until the lease was finally executed, in April, 1932. There was some litigation as to the final worked out in connection with securing the lease, which in the final form comprised twenty-two pages and was an agreement for a period of 980,000 over the fourteen-year period. Schmidt took an active part in these negotiations, together with the officers of the State Trust & Savings Bank and the Chicago Trust & Savings Bank. In April, 1932, a fire destroyed an apartment building on the premises known as the "Red House". Schmidt prepared a report and participated in negotiations for collection of the loss, which totaled \$79,000, and helped to arrange for the deposit of the

money in escrow in the First National Bank, Chicago.

After the appointment of a receiver for the Foreman⁴ State Trust & Savings Bank, in January, 1933, Schmidt negotiated with various trust companies to secure their services as corporate co-trustee in the Schmidt trust, and filed, individually and as co-trustee, the bill to construe the will of his father and procured an order of court determining the necessity of appointing a successor corporate trustee.

In September, 1933, Schmidt negotiated on the proposed sale of the trust's real estate to the United States government for a federal housing project, and shortly thereafter also negotiated with prospective purchasers for the sale of the premises for a race track. No sale resulted.

The master found that Schmidt performed virtually the duties of sole trustee from January 6, 1933, until June 8, 1935, and for the services rendered by him as trustee over a period of ten years he recommended payment to Schmidt of \$55,350, which the chancellor reduced to \$50,000. With respect to the character of Schmidt's services, the master found that "the services rendered by the petitioner were essential to the best interests of the trust estate and necessary in order to maintain the income of the trust, especially so in view of the fact that no sale of the property could be negotiated in spite of the various efforts made. That the services rendered by the trustee as shown in this report were primarily for the benefit of the trust estate and properly chargeable to the trust; that the salary, bonus and director's fees paid to petitioner were for services rendered directly to the corporation, and payment of same to him does not constitute a defense to petitioner's claim for fair and reasonable trustee's fees herein." The master also found that the petitioner has operated the trust estate, including the park corporation, in which the trust has a majority interest, and has continued to employ the land in which the trust estate has a three-fourths interest in such profit-

money in excess in the First National Bank, Chicago.

after the appointment of a receiver for the Foreman

State Trust & Savings Bank, in January, 1933, certain negotiated with various trust companies to secure their services as corporate co-trustees in the Schmidt trust, and later, individually and as co-trustees, and bill to construct the bill of the trust and procure an order of court determining the necessity of appointing a successor corporate trustee.

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The master found that certain had not lawfully the duties of sole trustee from January 1, 1933, until June 5, 1935, and for the services rendered by him as trustee over a period of ten years he recommended payment to certain of \$2,350, which the chancellor reduced to \$20,000. With respect to the compensation of Schmidt's services, the master found that "the services rendered by the petitioner were essential to the best interests of the trust estate and necessary in order to maintain the income of the trust, especially so in view of the fact that no sale of the property could be negotiated in spite of the various efforts made, that the services rendered by the petitioner were, in this report were primarily for the benefit of the trust estate and properly chargeable to the trust; that the salary, bonus and commission paid to petitioner were for services rendered and properly chargeable to the trust, and payment of same to him does not constitute a violation of petitioner's claim for fair and reasonable compensation therefor." The master also found that the petitioner was charged with the trust estate, including the bank corporation, in which the trust has a majority interest, and was continued to employ the land in which the trust estate has a three-fourths interest in such proportion.

able use so as to come through the difficult years of 1930 to 1935 in good financial shape, to be able to put the park company and the trust estate on a highly profitable basis for the company, and the trust estate on a highly profitable basis for the year 1936, "and that all this was done by him in spite of opposition he had to contend with in his efforts to maintain continuity in the operation of the park and in spite of criticism and obstacles put in his way by the Merle trust and the objector in this proceeding." The record amply justifies the master's conclusions.

It is argued by respondents that Schmidt is not entitled to be paid out of the trust estate the amount allowed by the court or any part thereof, because he wrongfully withheld from the trust estate more than he could possibly be entitled to as fees. Respondents rely on the well-known propositions of law that trustees are held to the highest requirements of unselfish conduct toward their beneficiaries, and that no considerations of personal advantage are permitted trustees when they conflict with the interest of the beneficiaries; also that a trustee is not permitted to profit from the trust or to use the trust estate in such a manner as to yield him profit; and they say that Schmidt failed to fulfill these specifications. It is pointed out that from the inception of the trusteeship he evinced an unrelenting and truculent hostility and animosity toward respondent Wilhelmina Gross, and they cite three examples of his attitude toward her. In the first of these they point out that George A. Schmidt's mother died leaving a will which bequeathed \$25,000 to Wilhelmina Gross and the residue to him; that under Wilhelmina's contention she was entitled to interest on this bequest from the date of the death of her grandmother, but that the executor refused to pay, on instructions from Schmidt, until Wilhelmina had won decisions in the Probate, Circuit, Appellate and Supreme courts of Illinois. The facts disclose that after the death of Minna Schmidt, Wilhelmina filed a bill to set aside her grandmother's will,

in which she ~~was~~ unsuccessful. The executor thereafter contended that the estate was not chargeable with interest upon the grandmother's \$25,000 bequest to Wilhelmina during the period that she was delaying distribution of the estate under the contention that there was no legal will nor legal executor and therefore no \$25,000 bequest. The Supreme court in State Bank of Chicago v. Gross, 344 Ill. 512, held adversely to the executor on this contention.

It is next urged that the trustees would not furnish Mrs. Gross with operating statements of the park company; that respondents offered to prove that Wilhelmina, through her attorneys, several times called on the trustees to furnish statements of the trust estate; that Whitman, speaking apparently for both trustees, refused to comply with the request, saying that Wilhelmina had nothing to do with the control of the estate and that all she was entitled to was income as the trustees might desire to pay it. The facts disclose that the statements which Wilhelmina requested were operating statements of the park, but no request for such statements was ever made upon George A. Schmidt. Counsel for Wilhelmina offered to testify that he had requested from Whitman statements of the trust estate and that the latter had said that they would not furnish them. However, respondents' own witness, Walter W. Head, former president of the State Bank of Chicago and Foreman ~~State~~ Trust & Savings Bank, testified that statements of the trust estate had been mailed periodically to Mrs. Gross at the same time they were sent to Schmidt; that they were photostatic copies of the bank's accounts books, which conveyed the information, and he said that he did not recall that the Grosses had ever complained to him that they had not received such statements. Because Whitman represented the estate he could not appropriately act as counsel and also take the stand for the purpose of rebutting the testimony with respect to demands that had been made upon him.

in which she was interested. The question whether contained that the estate was not chargeable with interest upon the ground- mother's \$25,000 bequest to Elizabeth during the period that she was delaying distribution of the estate under the contention that there was no legal will nor legal executor and therefore no \$25,000 bequest. The Supreme Court in Estate of Chicago, 344 Ill. 12, held adversely to the executor on this contention.

It is next urged that the estate should not furnish Mrs. Gross with operating statements of the bank in equity; that respondents offered to prove that Elizabeth, through her attorney, several times called on the trustees to furnish statements of the trust estate; that Elizabeth, speaking separately for both trustees, refused to comply with the request, saying that Elizabeth had nothing to do with the control of the estate and that all she was entitled to was income as the trustees might desire to pay it. The facts disclose that the statements which Elizabeth requested were operating statements of the bank, but no request for such statements was ever made upon George A. Schmidt, counsel for Elizabeth, offered to testify that he had received from Elizabeth statements of the trust estate and that the facts were such that they would not furnish them. However, respondents' own witness, Walter A. Reed, former president of the State Bank of Chicago and Foreman-Trust & Savings Bank, testified that statements of the trust estate had been called for by Mrs. Gross at the same time they were sent to Elizabeth; that they were photostatic copies of the bank's accounts books, which were the information, and he said that he did not recall that the books had ever been complained to him that they had not been furnished. Because Elizabeth represented the estate he testified that she acted as counsel and also take the stand for the purpose of giving the testimony which respect to demands made upon the

It is next urged that Schmidt wrote Wilhelmina a bitter letter indicating his antagonism toward her. This came about in 1929, early in Schmidt's trusteeship, as a result of the refusal of Wilhelmina to consent to the allowance of fees to Schmidt as trustee. In the course of the letter he said, "I shall meet you in this contact, which you seem to invite." Schmidt had requested only a fair allowance and Wilhelmina had responded that he was entitled to "no fee whatsoever." Schmidt's counsel point out that he had postponed his fees in the interest of the estate for several years, "and in part to give to Mrs. Gross a cooling time after her unsuccessful effort to break her grandmother's will." The record discloses that in January, 1930, Mrs. Gross was insisting that Schmidt should be removed as trustee, and that at the time the letter was written a contest on fees would have been injurious to the estate, as Schmidt explained in the letter; and that to have continued his services as trustee without protest might have been construed as a waiver by him of his trustee's fees.

Respondents also complain because the master and court excluded testimony offered by them tending to show a common bias of both trustees in the interests of petitioner, Schmidt, and against those of Wilhelmina Gross. Although there was constant friction between Wilhelmina and George A. Schmidt, which is characterized by the master as "criticism and obstacles put in his way *** by the objector in this proceeding," we find no justification for the charges leveled at this trustee. Wilhelmina Gross was evidently displeased with the manner in which both ^{her} grandfather and grandmother had disposed of their property. She first manifested this disposition by filing a contest to set aside her grandmother's will, and having failed in that regard became unrelenting in her opposition to the trustees whom her grandfather had designated and the administration of his estate by them. The offer of proof to show a bias on the part of the trustees in favor of Schmidt may fairly be classified as mere

It is next urged that Schmidt took Wilhelmina a bitter letter indicating his antagonism toward her. This came about in 1929, early in Schmidt's trusteeship, as a result of the refusal of Wilhelmina to consent to the allowance of fees to Schmidt as trustee. In the course of the letter he said, "I shall meet you in this contact, which you seem to invite." Schmidt has requested only a fair allowance and responded that he was entitled to "no fee whatsoever." Schmidt's counsel pointed out that he had postponed his fees in the interest of the estate for several years, "and in part to give to Mrs. Gross a good time after her unsuccessful effort to break her grandmother's will." The record discloses that in January, 1930, Mrs. Gross was insisting that Schmidt should be removed as trustee, and that at the time the letter was written a contest on fees would have been injurious to the estate, as Schmidt explained in the letter; and that to have continued his services as trustee without protest might have been construed as a waiver by him of his trustee's fees.

Respondents also complain because of a claim of a bad count excluded testimony offered by them claiming to show a common bias of both trustees in the interests of Wilhelmina, and against those of Wilhelmina Gross. Although there are constant friction between Wilhelmina and Gross, and although the latter is tormented by the master as "belittling and obstructive and in the way" by the objector in this proceeding, the objector in this proceeding for the charges leveled at this trustee, "that Wilhelmina Gross is a bad person" is displeased with the manner in which both ^{her} Wilhelmina and Gross have had disposed of their property. The objector insists that the objection by filing a contest to set aside her grandmother's will, and having failed in that regard because Wilhelmina is in opposition to the trustees when her grandmother had no mind and the administration of his estate by them. The offer of proof to show a bias on the part of the trustees in favor of Schmidt may fairly be classified as a mere

gossip and has no important bearing upon the question involved.

The remaining contention is that two or more trustees are entitled to share only one fee and that compensation having been provided for the corporate trustee Schmidt is not entitled to be further compensated for his services. There is abundant testimony that Schmidt carried the "laboring oar" and personally concerned himself with the matters hereinbefore related, and others. Even counsel for respondents conceded before the chancellor that if Schmidt were to be compensated at all as trustee his fee should be \$20,000. There are states which have invoked the rule that but a single fee should be allowed to two or more trustees who shall be left to divide it among themselves, but that is not the rule in Illinois. In this state each trustee under a proper showing is allowed the fee which he has earned by his services. (65 Corpus Juris, sec. 836, p. 927.) Schmidt's services were of a special character and he labored conscientiously for the estate throughout his trusteeship. The testator expressed the wish that he and the corporate trustee be compensated, and upon the showing made we think the award of \$50,000 to George A. Schmidt is reasonable and amply justified by the record.

We find no convincing reason for reversing the decretal orders of the chancellor and they are affirmed.

DECRETAL ORDERS AFFIRMED.

Scanlan and Sullivan, JJ., concur.

Gossip and has no information as to what was in question involved.
The remaining compensation is that two or more trustees
are entitled to share only one fee in that compensation having
been provided for the corporate trustee. Schmidt is not entitled
to be further compensated for his services. There is nothing
testimony that Schmidt carried the "liborin car" and personally

concerned himself with the matter during the matter, and
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but a single fee should be allowed to two or more trustees who shall
be left to divide it among themselves, and that is not the rule in
Illinois. In this state each trustee has a separate share, as allowed
the fee which he has earned by his services. (See, for example, sec.
836, p. 927.) Schmidt's services are of a legal character and he
labored conscientiously for the estate throughout his trusteeship.
The testator expressed his faith in the corporate trustee
be compensated, and upon the basis of the fee which the estate of
\$50,000 to George. Schmidt is responsible and equity justified by
the record.

to find no sufficient reason for removing him as executor
orders of the executor and his estate.

DECEASED ESTATE OF GEORGE W. SCHMIDT

Decedent and surviving, etc., executor.

41315

KARL M. GIBBON,
Appellee,

v.

3920 LAKE SHORE DRIVE BUILDING
CORPORATION, an Illinois cor-
poration, LEANDER J. IBOLD
and DR. MAX THOREK,
Appellants.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

3101A.385

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Karl M. Gibbon, plaintiff, brought mandamus proceedings to compel defendants, 3920 Lake Shore Drive Building Corporation, Leander J. Ibold, its president, and Dr. Max Thorek, secretary, to transfer 152 shares of the capital stock of the corporation into his name upon the stock books and records of the corporation, and to issue a new certificate to him evidencing such shares. Pursuant to a hearing by the court judgment was entered directing that a writ of mandamus issue compelling defendants to transfer 152 shares of the corporation stock from Alfred Blomquist and Charlotte J. Blomquist, his wife, who were the record holders of the stock, to Gibbon, and to issue a new stock certificate to him. Defendants appeal.

There is substantially no dispute as to the facts. The 3920 Lake Shore Drive Building Corporation was organized in January, 1928. Leander J. Ibold and Dr. Max Thorek are the president and secretary of the corporation, having occupied their offices for some five years prior to the filing of the suit. Ibold is also general manager of the building owned by the corporation since 1929. The company was organized to acquire the fee at 3920 Lake Shore Drive in Chicago and to operate improvements thereon consisting of an 18-story exclusive apartment building containing 30 apartments of 8 rooms each and a penthouse duplex apartment of 12 rooms as a co-operative apartment building wherein the tenants could acquire as owners the respective apartments occupied by

Harry M. Fisher

5-13-41

2

KARL W. BISHOP, Appellee,

Plaintiff,

vs.
3920 Lake Shore Drive, Defendant
Chicago, Illinois 90-10000
Portion, January 1, 1935
and DR. J. H. BISHOP, Appellants.

1. Plaintiff seeks to have the title of the property
Karl W. Bishop, plaintiff, against defendant
to compel defendant, who made no valid title to the property
December 1, 1934, his execution, and the same, defendant,
to transfer the title of the property to the corporation
into his name upon the stock books and records of the corporation,
and to issue a new certificate to him evidencing such shares.
Inasmuch as the court judgment was entered directing
that a title of ownership be transferred to transfer
the shares of the corporation from Alfred H. Bishop and
Christine J. Bishop, his wife, and vice versa, to the Bishop
the stock, to Bishop, and to issue a new certificate to
him, defendant.

There is no valid title to the property.
3920 Lake Shore Drive, Chicago, Illinois 90-10000
January, 1935, defendant, who made no valid title to the property
and ownership of the property, and the same, defendant,
of the property to the corporation, and the same, defendant,
is also a valid title to the property, and the same, defendant,
since 1934. The corporation is a valid title to the property,
and the same, defendant, is a valid title to the property,
consisting of the 10-000 shares of the corporation,
50 percent of the property, and the same, defendant,
is a valid title to the property, and the same, defendant,
could be held as owners of the property, and the same, defendant,

them. This was effected by the purchase of stock in the corporation and the issuance by the latter of 99-year proprietary leases to the tenants.

Alfred Blomquist and Charlotte, his wife, were among the original stockholders and proprietary lessees of the corporation, having purchased the 152 shares of stock which are the subject matter of this litigation. W. G. Potts had purchased 1,583 shares of stock which represented a duplex apartment, or penthouse, held by him under a proprietary lease. He occupied this apartment together with his wife, Jessie S. Potts, up to the date of his death September 3, 1937. Thereafter his widow continued in possession for several months, then vacated, and is no longer living in the premises. It appears from the evidence of two witnesses who were familiar with Mr. Potts' affairs, that his widow became the owner of the 1,583 shares of stock by inheritance upon Mr. Potts' death. July 18, 1939, Mrs. Potts purchased the 152 shares held by the Blomquists and caused the certificate evidencing these shares to be assigned by the Blomquists to Karl M. Gibbon, plaintiff herein, who holds this stock as agent or trustee for Mrs. Potts, the Blomquists having assigned and transferred to Gibbon their interest in the stock certificate originally issued to them.

Defendants in their answer admit that July 18, 1939, Gibbon presented the original certificate for 152 shares of stock to them with the assignment and transfer from the Blomquists to him on the back thereof, that Ibold and Thorek, as president and secretary respectively, were requested to transfer the stock to Gibbon, and that they refused to comply with his demand. The reason assigned for their refusal to make the transfer and issue a new certificate is predicated upon a resolution adopted by the stockholders of the corporation April 10, 1935, that "all stockholders desiring to sell their stock in the corporation should first offer it for sale to this corporation at the price they

them. This was effected by the purchase of stock in the corporation and the issuance by the latter of 33-year proprietary leases to the tenants.

Alfred Gibson, his wife, were among the original stockholders and proprietary lessees of the corporation, having purchased the 152 shares of stock which are the subject matter of this litigation. Mr. Potts had purchased 1,583 shares of stock which represented a duplex apartment, or penthouse, held by him under a proprietary lease. He occupied this apartment together with his wife, Jessie S. Potts, up to the date of his death September 3, 1937. Thereafter his widow continued in possession for several months, then vacated, and is no longer living in the premises. It appears from the evidence of two witnesses who were familiar with Mr. Potts' affairs, that his widow became the owner of the 152 shares of stock by inheritance upon Mr. Potts' death. July 10, 1939, Mrs. Potts purchased the 152 shares held by the Bloomfists and caused the certificate evidencing these shares to be assigned by the Bloomfists to Mr. Gibson, Plaintiff herein, who holds this stock as agent or trustee for Mrs. Potts, the Bloomfists having assigned and transferred to Gibson their interest in the stock certificate originally issued to them.

Defendants in their answer admit that July 12, 1939, Gibson presented and obtained a certificate for 152 shares of stock to them with the agreement and consent from the Bloomfists to him on the back thereof, that he hold the stock, as President and secretary respectively, were designated to transfer the stock to Gibson, and that they refused to comply with his demand. The reason assigned for their refusal to make the transfer and issue a new certificate is predicated upon a resolution adopted by the stockholders of the corporation April 12, 1939, and "all stockholders desiring to sell their stock in the corporation should first offer it for sale to this corporation at the price they

would be willing to sell it for to any other individual, corporation or firm," and failure of the Blomquists to first tender the stock for sale to the corporation. The gravamen of the defense is that the agreement entered into between the stockholders is a valid, binding and enforceable contract; that the mutual promises of the stockholders to relinquish their right of sale and free transfer in the stock of the corporation is supported by a valid consideration, and is binding upon the promisor; that the provision of the agreement of April 10, 1935, is a reasonable restraint on the alienation of the stock, not against public policy, and is therefore valid and enforceable; and that the corporation, having the power to purchase its own shares under the terms of the agreement, was ready, willing and able to do so.

It may be said as a general proposition that restrictions upon the free alienation of corporate stock are not favored in the law and will always be strictly construed. (Lawson v. Household Finance Corp., 17 Del. Ch. 1, 147 Atl. 312, 315; In re Starbuck's Estate, 221 N. Y. S. 540; MacDonald v. Farley & Loetscher Mfg. Co., 226 Iowa 53, 283 N. W. 261.) In accordance with these general principles those who seek to rely upon such restrictions in the sale of corporate stock have the burden, not only of establishing the reasonableness of the restrictions upon which they rely, but also of establishing that they are binding, through participation or mutual notice thereof, upon those against whom they are sought to be employed.

Plaintiff takes the position that the resolution does not and was not intended to apply to the sale and transfer of stock by one stockholder to another and that Mrs. Potts, at the time she purchased the Blomquists' stock, occupied the position of stockholder of her deceased husband's stock, even though it had not yet been transferred to her on the books of the corporation, because of the refusal of defendants to transfer the stock to her on her demand.

would be willing to sell it for to any other individual, corporation or firm," and failure of the Bloomington to first transfer the stock for sale to the corporation. The agreement of the defendant is that the agreement entered into between the stockholders is a valid, binding and enforceable contract; that the defendant promises of the stockholders to relinquish their right of sale on three transfer in the stock of the corporation is supported by a valid consideration, and is binding upon the plaintiff; that the plaintiff of the agreement of April 13, 1935, is a reasonable restraint on the alienation of the stock, not against public policy, and is therefore valid and enforceable; that the corporation, having the power to purchase its own stock, and the terms of the agreement, was ready, willing and able to do so.

It may be said as a general proposition that restrictions upon the free alienation of corporate stock are not favored at the law and will always be strictly construed. (Lawson v. Household Finance Corp., 17 Del. Ch. 1, 147 A. 2d 311; In re American Estate, 221 N. Y. 2, 240; McDonald v. Estate of McDonald, 118 Cal. 226 Iowa 53, 283 P. 2d 261.) In accordance with these general principles those who seek to rely upon a restriction in the sale of corporate stock have the burden, as well as the responsibility of establishing that they are entitled to such a restriction or mutual notice thereof, upon the stock, or by the stock to be employed.

Plaintiff takes the position that the restriction does not and was not intended to apply to the stock of the defendant by one stockholder to another and that the defendant purchased the Bloomington stock, consisting of the stock of the holder of her deceased husband's stock, and that the stock has been transferred to her on the books of the corporation, and that the refusal of defendant to transfer the stock to her is an error.

It was later ordered to be transferred in another mandamus proceeding. Defendants, on the other hand, argue that the resolution, if properly construed, must be held to apply to any sale, including one between existing stockholders. In view of the principle that stock sale restriction agreements are to be strictly construed the minutes of the meeting of April 10, 1935, relating to passage of the resolution, become an important consideration. The stockholders' meeting of that date was called for the fourfold purpose of (1) discussing plans for reorganization; (2) consideration of the audit of the books; (3) consideration of the status of the stockholders as co-operative owners of apartments under the proposed reorganization; and (4) certain questions to be raised by Roger Faherty, one of the stockholders. It was not contemplated nor was there any indication in advance that the subject of stock sales would be considered at this meeting. A discussion arose as to the transfer of stock from the Thorek trust to Dr. Thorek's son, and "Mr. Ibold then stated that he thought it was all right for a member of the family to transfer stock to another of the family, but that, due to the reorganization anticipated, stock held by present stockholders should be offered to the corporation for purchase by it before it is sold to strangers. He then moved that all stockholders desiring to sell their stock in the corporation should first offer it for sale to this corporation at the price they would be willing to sell to any other individual, corporation or firm." Evidently those present at the meeting were principally concerned with transfers and sales to strangers, and the resolution which ensued was undoubtedly prompted by the discussion which preceded it. This originated as a co-operative enterprise. It may fairly be assumed that those who purchased stock and acquired proprietary leases anticipated and desired that the building should become and remain of an exclusive character and the passage of the resolution was no doubt prompted by a desire on the part of stockholders to discourage the sale of stock to strangers,

It was later ordered to be returned to the original owners and
 proceed. Defendants, on the other hand, agree that the resolution
 if properly carried out, was to be to give to any sale, including
 one between existing stockholders. In view of the principle that
 stock sale restriction agreements are to be strictly construed the
 minutes of the meeting of April 10, 1935, relating to passage of
 the resolution, become an important consideration. The second
 holders' meeting of that date was called for the purpose of
 of (1) discussing plans for reorganization; (2) consideration of
 the audit of the books; (3) consideration of the status of the
 stockholders as co-operative owners of apartments under the proposed
 reorganization; and (4) certain questions to be raised by Roger
 Feherty, one of the stockholders. It was not recommended nor was
 there any indication in a sense that the sale of stock sales would
 be considered at this meeting. A discussion arose as to the transfer
 of stock from the first trust to Dr. Feherty's son, and Mr. Feherty
 then stated that the stock it was all right for a member of the
 family to transfer stock to another of the family, but that, due
 to the reorganization contemplated, stock held by present stockholders
 should be offered to the corporation for purchase by it before it is
 sold to strangers. He then moved that all stockholders desiring to
 sell their stock in the corporation should first offer it for sale
 to this corporation. The order they could be willing to sell to
 any other individual, a resolution on this. Evidently those present
 at the meeting were not fully conversant with the nature and effect of
 the resolution which was adopted. The resolution was undoubtedly presented
 by the discussion which preceded it. The resolution was a co-operative
 enterprise. It was clearly be intended that stock of the proposed stock
 and holding the stock should be sold to the corporation and the
 selling should be done and remain of an exclusive character and the
 passage of the resolution was no longer prompted by a desire on the
 part of stockholders to encourage the sale of stock to strangers.

but not to restrict the transfer of stock as between existing stockholders. The minutes of the meeting and the co-operative plan under which the corporation was organized lend support to this conclusion. In Serota v. Serota, 5 N.Y.S. (2d) 68, it was held that a by-law providing that "no certificate shall be offered for sale by any stockholder without first offering it to the other stockholders," would not apply to sales and transfers as among stockholders, but would be confined to sales to "outsiders." In Rychwalski v. Baranowski et al., 205 Wis. 193, a sale of stock was made as between two stockholders without complying with a by-law of the corporation requiring prior offer of sale to the whole body of stockholders. It was there contended by defendants that the sale restriction constituted an agreement between the stockholders who had "by contract with each other, preserved a sort of pre-emptive right which enables each at his option to preserve his proportionate ownership and control of the corporation." The court held, however, that stock sale restriction agreements and provisions have no application to sales and transfers as among stockholders in the absence of an express recital to that effect, and reaffirmed the doctrine (p. 198) that "since the restriction in question has validity as an exception to a well established rule prohibiting restrictions upon the alienation of personal property, it ought not to be enlarged by implication."

In the light of the discussion that prompted the passage of the resolution in the case at bar, the resolution cannot fairly be construed as an absolute restriction upon the sale and transfer of stock, and under the general rule that such restrictions are not favored in the law, and will always be strictly construed, we are impelled to hold that the resolution was never intended to restrict the transfer of stock by one stockholder to another. Defendants cite Casper v. Kalt-Zimmers Mfg. Co., 159 Wis. 517, and Baumohl v. Goldstein, 95 N. J. Eq. 597, as supporting their contention that the

but not to restrict the transfer of stock as between existing stockholders. The minutes of the meeting and the co-operative plan under which the corporation was organized lend support to this conclusion. In Gerota v. Gerota, 5 N.Y.2d 68, it was held that a by-law providing that "no certificate shall be offered for sale by any stockholder without first offering it to the other stockholders," would not apply to sales and transfers as among stockholders, but would be confined to sales to "outsiders."

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In the light of the discussion that prompted the passage of the resolution in the case at bar, the resolution cannot fairly be construed as an absolute restriction upon the sale and transfer of stock, and under the general rule that such a restriction is not favored in the law, and will always be strictly construed, we are impelled to hold that the resolution was never intended to restrict the transfer of stock by one stockholder to another. Defendants cite Gasper v. Kalt-Simmons Mfg. Co., 109 N.Y.2d 217, and Baranoff v. Goldstein, 35 N.Y.2d 727, as supporting their contention that the

resolution was binding as a restriction upon any sale. Both of these cases are distinguishable from the proceeding at bar for the cogent reasons that the sale restriction provisions were not qualified by any such explanatory statements as appeared in the minutes of the defendant corporation which provoked the passage of the resolution and that the restrictions which were held valid in those cases appeared in formal articles of incorporation or by-laws, the terms of which had had deliberate consideration; that full notice of the restrictions was had by all the parties in interest; and also because it affirmatively appeared that the restrictions were intended to preserve the existing balance of stock control.

It may be conceded, as defendants contend, that stock sale restrictions will be upheld if they can be said to be reasonable. This leads to a consideration of an important aspect of the case, resulting from the reorganization of defendant corporation and its status and that of its stockholders after the reorganization decree was entered. As a result of proceedings filed under sec. 77-b of the National Bankruptcy Act in the District Court for the Northern District of Illinois, a plan for reorganization was formulated and approved as to fairness in July, 1936, more than a year after the meeting of the stockholders of April 10, 1935. The submission and acceptance of the plan by the corporate stockholders, shareholders and creditors, and hearings thereon before the special master, took several months, and it was not until October, 1936, that the plan was ordered to be consummated. A final decree confirming the plan and closing the case was entered by the court June 15, 1937. The reorganization was of a sweeping character and resulted in thoroughgoing changes in the project affecting the rights of stockholders and others. The corporation was originally organized and the apartment building erected as a co-operative apartment project, whereby, through purchase of stock, stockholders would own

resolutions were intended to preserve the independence of local
interest; and also because it affirmatively declared that the ex-
tenuating notice of the resolutions was to be given to the public in
the laws, the terms of which had not been taken into consideration; that
in those cases appeared in formal articles of incorporation or
of the resolutions that the resolutions had been held valid
minutes of the defendant corporation which showed the passage
qualified by any such explanatory statements as appeared in the
the cogent reasons that the said resolutions were not
these cases are distinguishable from the present case for
resolution was binding as a resolution of the board of directors.

It may be conceded, as defendant insists, that stock sales restrictions will be applied if they can be shown to be reasonable. This leads to a consideration of an important aspect of the case, resulting from the reorganization of the firm and corporation and its status and that of its stockholders after the reorganization process was entered. As a result of proceedings filed under act 73-2 of the National Bankruptcy Act in the United States Bank for the Northern District of Illinois, a plan for reorganizing the firm was formulated and approved as to fairness in July, 1937, and then, after the meeting of the stockholders of April 1, 1937. The administration and acceptance of the plan by the various stockholders, members, holders and creditors, and various other persons, the reorganization, took several months, and it was not until early, 1937, that the plan was ordered to be consummated. It was then found that the plan was being carried out in accordance with the court's findings the plan and closing the case with a final decree affirming the plan and closing the case with a final decree. The reorganization was of a successful nature and resulted in thoroughgoing changes in the management of the firm and its stockholders and others. The corporation was reorganized and the apartment building erected on the site of the old building was destroyed, whereby, through purchase of stock, the firm was able to

one or more apartments, one of which they would occupy and others they would sublet. At the time of the meeting, April 10, 1935, there were eight stockholders. At the time of the proposal of the reorganization plan, however, some of the stockholders had apparently sold out to others, reducing the number to six who then owned all the capital stock and all the 30 existing 8-room apartments, duplex apartment or penthouse, and the garage stalls. Five of the 8-room apartments were occupied by stockholders, and the penthouse and the remaining 25 8-room apartments were sublet to other tenants.

Under the reorganization the corporation was converted from a co-operative apartment building corporation to an ordinary building corporation. All proprietary leases and subleases were canceled and surrendered to the corporation and the proprietary interests of the stockholders in the corporation property were wiped out. Stockholder lessees were required to surrender their proprietary leases and quitclaim all their interest in the property to the corporation and were enjoined from thereafter attempting to assert their proprietary interests against the corporation. The six stockholder-lessees were given the opportunity of continuing as ordinary lessees of the apartments occupied by them for a four-year period at a fixed rental, but they forfeited all interest in the 30 apartments they had formerly owned, which included the 25 they had sublet together with all rental income accruing therefrom. They were also deprived of all control of the leasing and subletting of apartments, the allocation of stock to apartments, and the unit feature of stock in apartments was terminated. All funds on hand January 1, 1937, were appropriated and completely exhausted in meeting obligations fixed in the plan. All income over and above that actually and necessarily required to meet bare operating expenses was required to be paid to the trustee for application upon the bonded debt, interest, taxes,

one or more apartments, one of which they would occupy and others they would sublet. At the time of the meeting, April 10, 1935, there were eight stockholders. At the time of the proposal of the reorganization plan, however, some of the stockholders had apparently sold out to others, reducing the number to six who then owned all the capital stock and all the 30 existing 8-room apartments, duplex apartment or penthouse, and the garage stalls. Five of the 8-room apartments were occupied by stockholders, and the penthouse and the remaining 22 8-room apartments were sublet to other tenants.

Under the reorganization the corporation was converted from a co-operative apartment building corporation to an ordinary building corporation. All proprietary leases and subleases were canceled and surrendered to the corporation and the proprietary interests of the stockholders in the corporation property were wiped out. Stockholder leases were required to surrender their proprietary leases and disclaim all their interest in the property to the corporation and were enjoined from thereafter attempting to assert their proprietary interests against the corporation. The six stockholder-lessees were given the opportunity of continuing as ordinary lessees of the apartments occupied by them for a four-year period at a fixed rental, but they forfeited all interest in the 30 apartments they had formerly owned, which included the 22 they had sublet together with all rental income accruing therefrom. They were also deprived of all control of the leasing and subletting of apartments, the allocation of stock to apartments, and the unit feature of stock in apartments was terminated. All funds on hand January 1, 1935, were appropriated and completely exhausted in meeting obligations listed in the plan. All income over and above that actually and necessarily required to meet bare operating expenses was required to be paid to the trustee for application upon the bonded debt, interest, taxes,

office expense, and compensation of the trustee, and nothing was permitted to be paid to the stockholders by way of dividends or arrears as long as the reorganization remained in effect. All assets, personal and real, including all leases, were required to be pledged as additional security for the bonded debt, and all homestead rights and rights of redemption were required to be waived. The making of improvements, repairs and replacements, decoration of apartments, and the supplying of equipment was curtailed and made subject to the approval of the trustee. The corporation was permitted to withhold from the net income a sufficient sum to keep intact a special operating reserve fund of \$1,500, but even this was closely restricted by a provision that no single item of repair, replacement or maintenance expenditure exceeding \$1,000 in amount, and no series of improvements, replacements or alterations in excess of \$500 in the aggregate in any one year might be made without the consent of the trustee. The plan provided that all the "net earnings" or "net income" were required to be employed by the trustee to pay accrued interest on the mortgage bonds, fees of trustee and counsel for the various parties, to create a reserve fund for payment of current real estate taxes, and to meet currently maturing interest installments on the mortgage bonds. All net earnings remaining after meeting these various items were required to be exhausted by being placed in a sinking fund to be used to retire mortgage bonds by payment or purchase in the open market. All cash on hand to January 1, 1937, was likewise completely exhausted by requirements for payment of unpaid general real estate taxes for the year 1934 and all prior years, the creation of a \$13,500 reserve to pay real estate taxes for the year 1935, the creation of a \$1,500 reserve operating fund and provisions for the payment of interest on the mortgage for the years 1935 and 1936, reorganization fees, costs and expenses allowed by the court. If any portion of the net income on hand January 1, 1937, remained after paying these various items, it was required to

be exhausted by deposit in the bond purchase and retirement "Sinking Fund." The first mortgage debt of \$599,500 as of January 1, 1937, was extended to the year 1950, and the reorganization was designed to accomplish a gradual scheduled reduction of the mortgage debt over the entire period. If it be assumed that the corporation has met this schedule there remained at the time of the entry of the judgment in the case at bar a principal first mortgage indebtedness of \$539,500.

Under the circumstances the question arises whether, if the Blomquist stock had been offered for sale to the corporation, it "was ready, able and willing to purchase said stock." Defendants affirmatively averred they were ready, able and willing to do so, but no evidence or testimony whatsoever was offered in support of the allegation. Defendants argue that under the statutes of this state a corporation has the power to purchase its stock. While it may be conceded that it has such power, we fail to find from the record that it had any funds or any reasonable expectations in the near future with which to make any such purchase. A situation which involves the same principle of law arose in Mancini v. Patrizi, 262 Pac. 375 (California). There the by-laws of the corporation provided that before stockholders could sell their stock they must first offer it to the corporation for purchase. Plaintiff sought to compel the transfer of certain stock which he had purchased from a stockholder, who, as here, had not offered the same to the corporation for purchase. In holding that the corporation could not refuse to transfer the stock, the court pointed out that an offer of sale would have been an idle act in view of the prohibition against purchase by a corporation of its own stock under the existing law of California, and that the by-law was invalid and unreasonable in requiring an offer of sale to which the corporation could not respond. As applicable to the question under consideration the court said (p. 377), "Moreover, the power to make by-laws is subject to the condition that they must not be unreason-

be exhausted by deposit in the bond business and investment "Sinking Fund." The first mortgage debt of \$200,000 as of January 1, 1937, was extended to the year 1940, and the reorganization was designed to accomplish a gradual amortization of the mortgage debt over the entire period. If it be assumed that the corporation was not this schedule there remained at the time of the entry of the judgment in the case at bar a principal first mortgage indebtedness of \$239,700.

Under the circumstances the question arises whether, in the Bloomquist stock had been offered for sale to the corporation, it was ready, able and willing to purchase said stock. Defendant affirmatively averred they were ready, able and willing to do so, but no evidence or testimony whatsoever was offered in support of an allegation. Defendant argues that under the statutes of this state the corporation has the power to purchase its stock. While it may be conceded that it has such power, we fail to find from the record that it had any funds or any reasonable expectations in the near future with which to make any such purchase. A situation which involves the same principle of law arose in Harrell v. Harrell, 69 Cal. 227 (California). There the by-laws of the corporation provided that before stockholders could sell their stock they must first offer it to the corporation for purchase. Plaintiff sought to compel the transfer of certain stock which he had purchased from a stockholder who, as here, had not offered the same to the corporation for purchase. In holding that the corporation could not refuse to transfer the stock the court pointed out that an offer of the stock was not required as a condition in view of the prohibition against purchase by a corporation of its own stock under the California law. Plaintiff, on the other hand, was invalid and unenforceable in requiring an offer of stock to the corporation could not respond. As a matter of fact the corporation was under consideration the court said (p. 237). "Moreover, the power to make by-laws is subject to the condition that they must not be unreasonably

able in their practical application; and, as the law neither does nor requires idle acts, a by-law which prescribes, as a condition to the right to transfer stock that an offer be made the acceptance of which is forbidden is manifestly unreasonable and consequently invalid." Because the resolution in the case at bar requiring stockholders first to offer their stock for sale to the corporation would have been an idle gesture, since the corporation had no funds with which to purchase such stock, we think the resolution was unreasonable.

Plaintiff's counsel argue with considerable force that defendants failed to sustain the burden of establishing their affirmative defense in respect to notice and knowledge on the part of certain stockholders, including Mrs. Potts and Mrs. Blomquist, and they discuss various other points affecting the restriction of free alienation of stock among shareholders, but in view of the conclusions reached on the two points discussed we deem it unnecessary to further extend this opinion by commenting thereon.

We think plaintiff has established a clear and undoubted right to the relief granted to him by the court, and therefore the judgment of March 5, 1940, granting a writ of mandamus to plaintiff should be affirmed and it is so ordered.

JUDGMENT GRANTING WRIT OF
MANDAMUS AFFIRMED.

Scanlan and Sullivan, JJ., concur.

this in their practical application; and, as the law neither does nor requires the use of a proxy which is provided for in the constitution to the right to transfer stock and in order to make the acceptance of which is forbidden in a practically unassailable and consequently invalid. Because the resolution in the case at bar requiring stockholders to vote to offer their stock for sale to the corporation would have been an ultra vires, since the corporation had no funds with which to purchase such stock, we think the resolution was unconstitutional.

Plaintiff's counsel argue with considerable force that defendants failed to sustain the burden of establishing their affirmative defense in respect to notice and knowledge on the part of certain stockholders, including Mrs. Foster and Mrs. Bloomquist, and they discuss various other points affecting the constitutionality of the resolution of stockholders, but in view of the conclusions reached on the two points discussed we deem it unnecessary to further extend this opinion by commenting thereon.

We think it is sufficient to state that the right to the relief claimed by the plaintiff is hereby denied, and therefore the judgment of the court is affirmed, and it is so ordered.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the court at the City of Portland, Oregon, this 14th day of May, 1934.

Seaman and Hildner, Attorneys, Portland, Oregon.

LORETTA HAMANN, HERMAN WEBER
and KNUTE SWANSON,
Appellants,

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

FRED BECKLENBERG, Appellee.

310 I.A. 385²

Plaintiffs, as alleged holders and owners of certain bonds of the Diversey Building Corporation, sued defendant, claiming that by a separate guaranty in writing he guaranteed the payment of said bonds. The following is the judgment order from which plaintiffs appeal:

"Now come the parties to this cause, and thereupon this cause comes on in regular course for trial before the Court without a jury, and the Court having heard the evidence and the arguments of counsel and being fully advised in the premises, enters the following finding, to-wit:

"Now comes the plaintiff herein and moves the Court that a new trial of this cause be granted, and the Court being fully advised in the premises, overrules said motion.

"This cause coming on for further proceedings herein, it is considered by the Court that final judgment be entered on the finding herein and that the plaintiff take nothing by this suit, and that the defendant have and recover of and from the plaintiff the costs by the defendant herein expended, and that

LORETTA HAMANN, HAMANN, WERNER
and KUTS STANSON,
Appellants,

VERSUS
FRED BECKENBERG,
Appellee.

MR. JUSTICE ROANMAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs, as alleged holders and owners of certain bonds of the Diversely Building Corporation, and defendant, claiming that by a separate guaranty in writing he guaranteed the payment of said bonds. The following is the judgment order from which plaintiff's appeal:

"It is ordered that a trial by jury in this cause be waived and that this cause be submitted to the Court for trial without a jury.

"Now come the parties to this cause, and thereupon this cause comes on in regular course for trial before the Court without a jury, and the Court having heard the evidence and the arguments of counsel and being fully advised in the premises, enters the following finding, to-wit:

"The Court finds the issues against the plaintiff. "Now comes the plaintiff herein and moves the Court that a new trial of this cause be granted, and the Court being fully advised in the premises, overrules said motion. "Now comes the plaintiff herein and moves the Court in arrest of judgment, and the Court being fully advised in the premises, overrules said motion.

"This cause coming on for further proceedings herein, it is considered by the Court that final judgment be entered on the finding herein and that the plaintiff take nothing by this suit, and that the defendant have the recover of and from the plaintiff the costs by the defendant herein expended, and that

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execution issue therefor." (*Italics ours.*)

Plaintiffs state in their brief that "the case was heard by the Court without a jury on the pleadings, [*italics ours*] jury having been waived by the defendant, and a judgment was rendered against the plaintiffs and for the defendant," and they argue this appeal upon the theory that we are to determine the merits of the appeal upon the pleadings. Defendant states in his brief that "the case was not tried on the pleadings. There was a regular trial at which extensive evidence was taken upon the issues of fact presented and these issues were found in favor of the defendant." The judgment of the trial court supports defendant's statement. It is true that the record shows that plaintiffs, sometime prior to the trial of the cause, had endeavored to have the case determined upon the pleadings. They made a motion to strike the defense, which was overruled. They also made a motion, supported by an affidavit, for summary judgment. The affidavit recited, inter alia, that "there were and are no facts to present to a jury, and that the questions involved are questions of law." Defendant, in a counter-affidavit, recited that the plaintiffs are not in fact the owners of the bonds sued upon in the present cause, and further recited that there are other questions involved which are questions of fact and not questions of law. An order was then entered allowing plaintiffs to withdraw the motion to strike defendant's defense and also the motion for summary judgment, and it was nine months after the entry of that order that the cause came on for trial. We note that plaintiffs assigned two errors in support of their appeal, (1) "The judgment of the trial Court is contrary to the law applicable to the case," and (2) "The judgment of the trial Court is contrary to the facts of the case." It is manifest from the pleadings that several material questions of fact were presented by the pleadings.

No report of proceedings has been included in the record upon the instant appeal and defendant contends that "there being

execution issue therefor." (Italics ours.)

Plaintiffs state in their brief that "the case was heard

by the Court without a jury on the pleadings, [Italics ours] jury

having been waived by the defendant, and a judgment was rendered

against the plaintiffs and for the defendant," and they argue this

appeal upon the theory that we are to determine the merits of the

appeal upon the pleadings. Defendant states in his brief that

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defendant." The judgment of the trial court supports defendant's

statement. It is true that the record shows that plaintiffs, some-

time prior to the trial of the case, had endeavored to have the

case determined upon the pleadings. They made a motion to strike

the defense, which was overruled. They also made a motion, supported

by an affidavit, for summary judgment. The affidavit recited, inter

alia, that "there were and are no facts to present to a jury, and

that the questions involved are questions of law." Defendant, in a

counter-affidavit, recited that the plaintiffs are not in fact the

owners of the bonds sued upon in the present cause, and further

recited that there are other questions involved which are questions

of fact and not questions of law. An order was then entered allowing

plaintiffs to withdraw the motion to strike defendant's defense and

also the motion for summary judgment, and it was nine months after

the entry of that order that the cause came on for trial. We note

that plaintiffs assigned two errors in support of their appeal, (1)

"The judgment of the trial Court is contrary to the law applicable

to the case," and (2) "The judgment of the trial Court is contrary

to the facts of the case." It is manifest from the pleadings that

several material questions of fact were presented by the pleadings.

No report of proceedings has been included in the record

upon the instant appeal and defendant contends that "there being

no report of proceedings it must be presumed that the evidence was sufficient to justify the judgment." Where there is no report of proceedings the presumption is that the evidence was sufficient to sustain the findings and the judgment of the court. (Addante v. Pompilio, 303 Ill. App. 172; Kilpatrick v. Schmitt, 303 Ill. App. 15.) In plaintiffs' reply brief they concede that there was some evidence introduced, viz., the bonds and the alleged guaranty, but they claim that this evidence was introduced without objection. As to a vital issue of fact raised by defendant's pleadings, viz., that plaintiffs could not maintain the action because they were not the legal owners and holders of the bonds sued on, plaintiffs' counsel state, in the reply brief, "It was by agreement of the parties before this case came on for hearing, that it would not be necessary to bring in the bond holders in order for them to prove their ownership and it seems strange for counsel to raise the argument here for the first time." Defendant denies the alleged agreement and states that the evidence upon the trial established that plaintiffs did not in fact own the bonds sued upon. Defendant contends that the bonds sued upon represent a very trifling fraction of the entire bond issue and that plaintiffs are merely seeking by the present suit to interfere with the plan of reorganization favored by the owners of practically all of the entire issue; that the instant suit is but an attempt to capitalize "upon a mere nuisance value."

The judgment of the Municipal court of Chicago in the instant case recites that the court heard the evidence and the arguments of counsel and "the court finds the issues against the plaintiff." In the absence of a report of proceedings we are bound by this judgment, and the controversy between the counsel in this court as to what occurred at the trial serves to illustrate the wisdom of the rule that the burden of preserving the evidence heard by a report of proceedings is upon the party attacking the

no report of proceedings it must be presumed that the evidence was sufficient to justify the judgment." Where there is no report of proceedings the presumption is that the evidence was sufficient to sustain the findings and the judgment of the court. (Adams v. Pomplis, 303 Ill. App. 172; Illinois v. Belmont, 303 Ill. App. 171.) In plaintiffs' reply brief they concede that there was some evidence introduced, viz., the bonds and the alleged guaranty, but they claim that this evidence was introduced without objection. As to a vital issue of fact raised by defendant's pleadings, viz., that plaintiffs could not maintain the action because they were not the legal owners and holders of the bonds sued on, plaintiffs' counsel state, in the reply brief, "it was by agreement of the parties before this case came on for hearing, that it would not be necessary to bring in the bond holders in order for them to prove their ownership and it seems strange for counsel to raise the argument now for the first time." Defendant denies the alleged agreement and states that the evidence upon the trial established that plaintiffs did not in fact own the bonds sued upon. Defendant contends that the bonds also upon represent a very trifling fraction of the entire bond issue and that plaintiffs are merely seeking by the present suit to interfere with the plan of reorganization favored by the creditors of practically all of the entire issue; that the instant suit is but an attempt to capitalize "upon a mere balance sheet."

The judgment of the Municipal Court of Chicago in the instant case recites that the court heard the evidence and the arguments of counsel and "the court finds the facts against the plaintiff." In the absence of a report of proceedings we are bound by this judgment, and the controversy between the parties in this court as to what occurred at the trial so far as it affects the wisdom of the rule that the burden of proving the evidence heard by a report of proceedings is upon the party attacking the

judgment order. We must presume that the evidence heard by the trial court was sufficient to justify the judgment. In view of our conclusion upon the instant question it is unnecessary for us to consider several other questions raised and argued.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

judgment order. The court was satisfied to justify the judgment. In view of our conclusion upon the instant question it is unnecessary for us to consider several other questions raised and argued.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J. and Sullivan, J., concur.

41020

MARTHA ULVICK, Administratrix of
the Estate of Newell B. Ulvick,
Deceased,

Appellee,

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

BALTIMORE & OHIO RAILROAD COMPANY,
a corporation,

Appellant.

310 E.A. 386

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Administratrix of the Estate of Newell B. Ulvick, deceased, sued to recover damages on account of the death of her intestate. Plaintiff originally sued several railroad companies but at the close of her case she voluntarily dismissed all defendants out of the case except the Baltimore & Ohio Railroad Company, hereinafter called defendant. A jury returned a verdict in favor of plaintiff and assessed her damages in the sum of \$4,000. Defendant appeals from a judgment entered upon the verdict.

The complaint, in one count, alleges that on June 12, 1937, defendant was operating a passenger train in a southerly direction across 87th street, just west of Damen avenue, Chicago, at about 11:15 p. m.; that plaintiff's intestate was crossing defendant's tracks in his automobile, proceeding in a westerly direction, with due care and diligence for his own safety; that defendant so negligently maintained and operated its railroad and crossing and so negligently drove its passenger train, that the train struck with great force and violence the automobile of plaintiff's intestate and that he received injuries from which he died within one year prior to the commencement of this suit. The complaint alleged that defendant was guilty of the following acts of negligence: (1) That no bell of thirty pounds weight or steam whistle on the engine was rung or whistled at a distance of eighty rods from the crossing and kept ringing or whistling until the

MARTHA ULIVICK, Administratrix of
the Estate of Newell B. Ulivick,
Deceased,
Appellee,

BALTIMORE & OHIO RAILROAD COMPANY,
a corporation,
Appellant.

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Administratrix of the Estate of Newell B.

Ulivick, deceased, sued to recover damages on account of the death
of her intestate. Plaintiff originally sued several railroad
companies but at the close of her case she voluntarily dismissed
all defendants out of the case except the Baltimore & Ohio Rail-
road Company, hereinafter called defendant. A jury returned a
verdict in favor of plaintiff and assessed her damages in the sum
of \$4,000. Defendant appeals from a judgment entered upon the
verdict.

The complaint, in one count, alleges that on June 14,
1937, defendant was operating a passenger train in a southerly
direction across 37th Street, just west of Madison Avenue, Chicago,
at about 11:15 p. m.; that plaintiff's intestate was crossing
defendant's tracks in his automobile, from east to west, at
defendant's crossing, with due care and diligence, to his left; that
defendant so negligently maintained and operated its railroad and
crossing and so negligently drove its train that the
train struck with great force and violence the automobile of plain-
tiff's intestate and that he received injuries from which he died
within one year prior to the date of his death. The
complaint alleged that defendant was guilty of the following acts
of negligence: (1) That no bell or whistle sounded within 100 feet
from the crossing and kept ringing or whistling until the

crossing was reached, contrary to the statute. (2) That 87th street was one of the principal arteries of travel in Chicago and it was the duty of defendant to maintain gates or a watchman at said street corner. (3) That defendant failed to maintain said crossing and the approach thereto so that it was at all times safe as to persons and property, contrary to the statute. (4) That defendant failed to properly maintain a locomotive headlight of sufficient candle power so as to enable the operator of the locomotive to discern a man upon the track at a distance of eight hundred feet, contrary to the statute. (5) That defendant, through its servants, drove said engine and train at a speed in excess of thirty miles an hour, which said speed was excessive and improper.

The answer of defendant denied the various acts of negligence charged, and further denied that plaintiff's intestate was in the exercise of due care and diligence for his own safety, and averred that the engine bell was rung continuously while the train approached the crossing and that the whistle on the locomotive was whistled at a distance of eighty rods from said crossing and kept whistling until the crossing was reached; further averred that it was not defendant's duty to maintain gates or a watchman at the crossing to give warning of the approach of trains.

At the close of plaintiff's evidence and at the close of all the evidence defendant moved for a peremptory instruction to find it not guilty. The motions were overruled and written instructions tendered therewith refused. Defendant also filed a motion for judgment notwithstanding the verdict, and in the alternative for a new trial. Both motions were overruled and denied.

A number of contentions are urged by defendant but in the view that we have taken of this appeal it is only necessary to consider the following one: "There is no evidence in the record tending to show that at and immediately prior to the time

crossing was reached, contrary to the statute. (3) That 57th street was one of the principal arteries of travel in Manhattan and it was the duty of defendant to maintain a watchman at said street corner. (3) That defendant failed to maintain said crossing and the approach thereto so that it was at all times safe as to persons and property, contrary to the statute. (4) That defendant failed to properly maintain a locomotive headlight of sufficient candle power so as to enable the operator of the locomotive to discern a man upon the track at a distance of eight hundred feet, contrary to the statute. (5) That defendant, through its servants, drove said engine and train at a speed in excess of thirty miles an hour, which said speed was excessive and improper.

The answer of defendant denied the various acts of

negligence charged, and further denied that plaintiff's testimony was in the exercise of due care and diligence for his own safety, and averred that the engine bell was rung continuously while the train approached the crossing and that the whistle on the locomotive was whistled at a distance of eighty rods from said crossing and kept whistling until the crossing was reached, further averred that it was not defendant's duty to maintain a watchman at the crossing to give warning of the approach of trains.

At the close of plaintiff's evidence and at the close of all the evidence referred to, the court instructed the jury to find it not guilty. The motion was overruled and written instructions tendered therewith refused. Defendant also filed a motion for judgment notwithstanding the verdict, and in support thereof for a new trial. Both motions were overruled and denied.

A number of contentions are raised by defendant, but the view that we have taken of this appeal is the only one that we consider the following ones: "There is no evidence in the record tending to show that at and immediately prior to the time

of the happening of the accident in question, the deceased, Newell B. Ulvick, was in the exercise of due care and caution for his own safety. On the contrary, the evidence affirmatively shows that he was guilty of negligence which proximately contributed to bring about his death." As to the foregoing contention plaintiff answers: "The question of contributory negligence is a question of fact for the jury. In the instant case there was more than sufficient evidence to justify the jury in finding Newell B. Ulvick was in the exercise of due care and caution for his own safety." The accident occurred at the railroad crossing of defendant over 87th street on the night of June 12, 1937, at about 11:15 p. m. daylight saving time. At this crossing there are two B. & O. tracks, one northbound and one southbound; also two Pennsylvania railroad tracks located about eighty-three feet east of defendant's tracks. 87th street is an east and west street. The railroad tracks do not run exactly north and south but run in a northwesterly and southeasterly direction. East of the railroad tracks is Damen avenue, a north and south street. As appears from the testimony and photographs and a plat introduced in evidence the territory around the crossing is practically an open one. On the northeast corner of Damen avenue and 87th street is a hot-dog stand. From the west side of this stand to the B. & O. tracks is two hundred and four feet. From the center of the northbound Pennsylvania track to the center of the southbound B. & O. track is one hundred nineteen feet. From the middle of the northbound B. & O. track to the middle of the southbound Pennsylvania track is eighty-three feet. Between the Pennsylvania tracks and the B. & O. tracks there is a watchman's shanty, which is forty-seven feet east ~~approximately~~ of the center of the southbound B. & O. tracks. From the hot-dog stand to the B. & O. tracks the sole obstruction is the watchman's shanty. From one hundred and fifty feet east of Damen avenue to the hot-dog stand there is a clear view of the B. & O. tracks "for a block and a half

of the happening of the accident in question, the deceased, himself, B. Ulvick, was in the exercise of due care and caution for his own safety. On the contrary, the evidence affirmatively shows that he was guilty of negligence which proximately contributed to bring about his death. As to the foregoing contention, the following answers:

"The question of contributory negligence is a question of fact for the jury. In the instant case there was more than sufficient evidence to justify the jury in finding contributory negligence in the exercise of due care and caution for his own safety." The accident occurred at the railroad crossing of defendant over 57th street on the night of June 12, 1937, at about 11:15 p. m. following a rain storm. At this crossing there are two B. & O. tracks, one northbound and one southbound; also two Pennsylvania railroad tracks located about eighty-three feet east of defendant's tracks. 57th street is an east and west street. The railroad tracks do not run directly north and south but run in a northeasterly and southeasterly direction. West of the railroad tracks is a main avenue, a north and south street, as appears from the plat and the topography and plat introduced in evidence. The factory around the crossing is practically an open one. On the north side of the main avenue and 57th street is a dog stand. From the west side of this stand to the B. & O. tracks is two hundred and twenty feet. From the center of the northbound Pennsylvania tracks to the center of the southbound Pennsylvania tracks is one hundred and twenty feet. From the middle of the southbound P. & B. tracks to the middle of the southbound Pennsylvania tracks is one hundred and twenty feet. From the Pennsylvania tracks and the B. & O. tracks there is a clear shanty, which is forty-two feet wide. From the center of the southbound P. & B. tracks to the center of the B. & O. tracks are one hundred and fifty feet. From the center of the B. & O. tracks to the center of the Pennsylvania tracks there is a clear view of the B. & O. tracks for a distance of one hundred and fifty feet east of the crossing. From the center of the Pennsylvania tracks to the center of the B. & O. tracks there is a clear view of the B. & O. tracks for a distance of one hundred and fifty feet east of the crossing.

or more north of the crossing." As you proceed west on 87th street there is a cross-arm or cross-buck standing at the east of the Pennsylvania tracks, and a cross-arm or cross-buck just east of the B. & O. tracks. On the cross-arm of the Pennsylvania company are the words, "Railroad Crossing," and underneath these words, the word, "Danger." On the B. & O. cross-arms are the words, "Railroad Crossing." A watchman was maintained at the crossing until ten o'clock each night. He watched the tracks for both companies. At a point 365 feet east of the southbound B. & O. track there is a state highway sign on the north side of 87th street, which is in the form of a disc having reflectors upon it and the letters "R. R." The train involved in the accident was called the Fort Pitt Limited. It was an eastbound passenger train consisting of nine passenger cars and two large locomotives. No rain was falling and the streets were dry.

The following is the substance of the testimony given by plaintiff's witnesses: Herman Hoefer testified that at the time in question he was driving west on 87th street; that it was very dark; that he had on his bright headlights; that it was only clear about fifty yards ahead of him; that there were no automobiles crossing the tracks as he drew near; that he recalled passing the Pennsylvania tracks and he was going between twenty-three and twenty-five miles an hour as he crossed said tracks; that he did not see any train; that he then crossed the B. & O. tracks; that when he was on the B. & O. tracks his attention was called to a train; that he had not heard any whistle or bells up to that time; that all the windows in his car were closed "except his which was on the left side; that it was about half open;" that he looked to his right and saw the approaching train; that the glare of the light called his attention to it; that the light was then about a hundred feet from the crossing; that the train crossed when he was about twenty-five to fifty feet from the track; that at that point he looked in the rear view mirror and saw the train going past; that as the train passed 87th street he saw a car swerve to the right and try to get out of the way; that he

or more north of the crossing." As you proceed west on 87th Street there is a cross-arm or cross-buck standing at the east of the Pennsylvania tracks, and a cross-arm or cross-buck just east of the B. & O. tracks. On the cross-arm of the Pennsylvania company are the words, "Railroad Crossing," and underneath these words, the word, "Danger." On the B. & O. cross-arms are the words, "Railroad Crossing." A watchman was maintained at the crossing until ten o'clock each night. He watched the tracks for both companies. At a point 365 feet east of the southward B. & O. track there is a state highway sign on the north side of 87th Street, which is in the form of a disc having reflectors upon it and the letters "B. O." The train involved in the accident was called the North River Limited. It was an eastbound passenger train consisting of nine passenger cars and two large locomotives. No rain was falling and the streets were dry. The following is the substance of the testimony given by Plaintiff's witnesses: Norman Loefer testified that at the time in question he was driving west on 87th Street, and it was very dark; that he had on his bright headlights; and it was only clear about fifty yards ahead of him; that there were no automobiles crossing the tracks as he drove west; that he recalled having the Pennsylvania tracks and he was going between twenty-five and thirty miles an hour as he crossed said tracks; that he did not see any train; that he then crossed the B. & O. tracks; that he was in the B. & O. tracks his attention was called to a train; that he did not hear any whistle or bells up to that time; that at the window in his car were closed "and this is what was on the last night; that it was about half of 11; that he looked to the right and saw the east-bound train; that the front of the light engine was about 100 feet from the light; that about a hundred feet from the train; that the train crossed when he was about twenty-five to thirty feet from the track; that at that point he looked in the rear view mirror and saw the train going past; that as the train passed after that he saw a car swerve to the right and try to get out of the way; that he

heard a sort of ping noise and stopped and looked around, but the train obstructed his view; that in his opinion the train was traveling approximately fifty miles an hour as it approached the crossing; that 87th street was a much used highway; that as he reached the crossing he thought he heard a whistle. On cross-examination the witness stated that he did not hear the train and did not notice the lights from the train until his attention was called to the train; that there was not much traffic on 87th street that night. Rita Gallagher testified that she was riding on the front seat of the Hoefer automobile; that she recalled coming to the two railroad tracks; that there was no automobile in front of them going west; that she recalled reaching the Pennsylvania tracks; that until the time she reached the Pennsylvania tracks she did not hear a whistle, nor did she hear the sound of any bell; that she recalled coming to the B. & O. tracks and that up to that time she did not hear any whistle; that her hearing was perfect and her eyesight all right; that she recalled watching the B. & O. tracks and she then noticed a headlight about two hundred feet north; that she called out when she observed this light; that in her opinion the train was going about sixty miles an hour. Anna Young testified that she was also riding in the Hoefer car and that all the windows in the automobile were closed except that a window near the driver was a little open; that she did not hear the sound of a bell or whistle; that she did not see any trains at the time they were crossing 87th street; that when they were right on the track she saw a big light about one hundred to two hundred feet to her right side; that up to that time she had not heard any whistle or bell; that the car in which she was riding was traveling twenty-five or thirty miles an hour; that their car was two hundred feet away from the B. & O. tracks when the train crossed. On cross-examination she said that when they came up there she saw the headlight of the train coming down the track; that their automobile went two hundred feet beyond the track before she heard the crash. George Young

heard a sort of ping noise and stopped and looked around, but the train obstructed his view; that in his opinion the train was traveling approximately fifty miles an hour as it approached the crossing; that 87th street was a much used highway; that as he reached the crossing he thought he heard a whistle. On cross-examination the witness stated that he did not hear the train and did not notice the lights from the train until his attention was called to the train; that there was not much traffic on 87th street that night. With all that testified that she was riding on the front seat of the motor automobile; that she recalled coming to the two railroad tracks; that there was no automobile in front of them going west; that she recalled reaching the Pennsylvania tracks; that until and when she reached the Pennsylvania tracks she did not hear a whistle, nor did she hear the sound of any bell; that she recalled coming to the B. & O. tracks and that up to that time she did not hear any whistle; that her hearing was perfect and her eyesight all right; that she recalled reaching B. & O. tracks and she then noticed a red light about two hundred feet north; that she called out when she saw this light; that in her opinion the train was going about fifty miles an hour. Young testified that she was also riding in the car and that all the windows in the automobile were closed except the window near the driver was a little open; that she did not hear the sound of a bell or whistle; that she did not see any train at the time they were crossing 87th street; that they were right on the track she saw a big light about one hundred to two hundred feet to her right side; that up to that time she did not hear any whistle or bell; that she sat in which she was sitting was traveling between five or thirty miles an hour; that the train came from the west away from the B. & O. tracks and the train crossed the crossing examination she said that when they came up to the tracks and saw the headlights of the train coming down the track; that the automobile went two hundred feet beyond the track before she heard the sound of the train.

testified that he was riding in Hoefer's automobile. His testimony was substantially the same as that of the other parties who were riding in Hoefer's car. He testified that he was looking straight ahead until they hit the railroad tracks; that "when we were on the rail, I heard a noise and looked around. I heard the clatter of the engine." Henry P. English and Allen Devine were riding together in an automobile which was traveling west on 87th street and which was still east of the railroad tracks when the accident occurred. English testified that when they arrived at Damen avenue the accident had already happened; that he saw two cars in front of them and as these cars passed over the Pennsylvania tracks the car to the left (deceased's car) swung to the left and cut diagonally across the pavement between the Pennsylvania and B. & O. tracks and was struck by the B. & O. train in the southerly lane of 87th street; that the car in which he, English, was riding was not quite up to Damen avenue when the accident occurred; that the automobile of the deceased was going about thirty-five miles an hour and the train between forty-five and fifty; that the other automobile that was in front of their car stopped between the Pennsylvania and B. & O. tracks; that he heard two short whistles before the accident and before that he saw the train about a block north of 87th street. On cross-examination he testified that when he first saw the car that was struck it was just approaching the intersection of Damen avenue; that when they, English and Devine, were further back he saw the said car crossing the Pennsylvania tracks; that there were two cars in the space between the two railroads; that they looked pretty even; that the car which was struck was toward the south and the other car further north; that they, English and Devine, were about a half block from the B. & O. tracks when they heard the whistle; that the car which was struck was then just coming onto the Pennsylvania tracks; that he could see the headlight on the B. & O. engine at the time; that when he first

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testified that he was riding in Hooper's automobile. His testimony was substantially the same as that of the other parties who were riding in Hooper's car. He testified that he was looking straight ahead until they hit the railroad tracks; that "when we were on the rail, I heard a noise and looking around, I heard the clatter of the engine." Henry F. English and Allen Levine were riding together in an automobile which was traveling west on 87th street and which was still east of the railroad tracks when the accident occurred. English testified that when they arrived at Damen avenue the accident had already happened; that he saw two cars in front of them and as these cars passed over the Pennsylvania tracks the car to the left (deceased's car) swung to the left and cut diagonally across the pavement between the Pennsylvania and P. & O. tracks and was struck by the P. & O. train in the southernly lane of 87th street; that the car in which he, English, was riding was not quite up to Damen avenue when the accident occurred; that the automobile of the deceased was going about thirty-five miles an hour and the train between forty-five and fifty; that the other automobile that was in front of their car stopped between the Pennsylvania and P. & O. tracks; that he heard two or three whistles before the accident and before that he saw the train about a block north of 87th street. On cross-examination he testified that when he first saw the car that was struck it was just approaching the intersection of Damen avenue; that when they, English and Levine, were further back he saw the said car approaching the Pennsylvania tracks; that there were two cars in the space between the two railroad tracks; that they looked thirty-seven feet or more back on the road; that they heard the whistles; that the car which was struck was then just coming onto the Pennsylvania tracks; that a bell rang just headlight on the P. & O. engine at the time; that when he first

saw it the engine was about a block north of the crossing; that he heard it whistle twice; that as they got closer to the crossing they could hear the noise of the locomotive and train; that he thought that if you were between the B. & O. and Pennsylvania tracks you would be able to see the train; that he saw it a block or so away; that he did not hear any bells. Allen Devine testified that he saw two automobiles going west on 87th street ahead of them; that these two automobiles were driving abreast about a hundred and fifty feet ahead of witness's car; that he was going about thirty-five miles an hour and the two cars ahead were going at about the same rate; that he, the witness, had just passed a street car bus when he noticed these cars ahead of him going west on 87th street; that by the time he, the witness, approached Damen avenue one of the two cars stopped "and the other was over on the B. & O. tracks;" that the car that pulled to the left was hit by the train; that he saw the actual impact of the train and the automobile; that there were no other automobiles ahead of him except these two before the train crossed 87th street; that he heard a whistle; that when the train was about two hundred feet north of 87th street he heard two blasts; that he did not hear any bells; that when he first saw the train it was about a block north of 87th street; that his car was in motion at the time. Upon cross-examination the witness testified that he saw the headlight on the B. & O. train before he got to Damen avenue; that when you are between Damen avenue and Winchester street you have an unobstructed view of the southbound B. & O. track but not all the way; that his view was not obstructed; that the headlight on the locomotive was burning brightly and that he heard the whistle plainly; that there was a shrill blast. William Unger, John M. Kirwan and Fred M. Schaak also testified for plaintiff. They were police officers who came to the place after the accident had happened. Unger took some pictures of the automobile involved in the accident. He testified that there was a regular railroad wooden

standard with wooden cross-bars east of the B. & O. tracks, one between the two tracks and one east of the Pennsylvania tracks; that there was a crossing sign about half a block east of Damen avenue, a button reflector sign on the side of the road that had no lights on it but the buttons are supposed to reflect back from the headlights of the automobiles; that on 87th street there is a concrete surface and a grade that begins about twenty-seven feet east of the Pennsylvania tracks and goes up to the railroad crossing; that between the Pennsylvania tracks and the B. & O. tracks is a slight grade with gravel between the tracks; that on the northeast corner of 87th street and Damen avenue is "a sort of little hot-dog stand;" that "when you come up to Damen avenue you have a clear view to the north for two or three blocks;" "everything is clear;" that "the portion of 87th street for west-bound traffic is about thirty feet."

As to the testimony of defendant's witnesses: Edward Mies, the fireman on the head engine of the train involved in the accident, testified that the first stop of the train after they left the Grand Central station was at 63d street; that he sat on the left side of the engine as he faced forward; that when the train left 63d street the engine bell, an automatic bell of the clapper type, was ringing; that the headlight was burning brightly and was still burning brightly at the time of the accident; that as they approached 87th street the engineer sounded the whistle for the crossing at the whistling post, located about eight hundred feet north of the crossing; that he heard the engineer sound the regulation whistle, two long and two short blasts; that as they approached 87th street he looked to the east and saw quite a few cars approaching on 87th street; that he first saw the car which was struck when it was three hundred feet east of the crossing; that he continued to watch it and noticed that it did not stop; that he noticed it again at the Pennsylvania tracks and at that time it was coming at a speed of about thirty-five miles an hour; that there was a car parked on Damen avenue and a car

standard with modern cross-ways east of the ... one

between the two tracks and one east of the Pennsylvania tracks; that

there was a crossing sign about half a block east of ...

a button reflector sign on the side of the road and no lights

on it but the buttons are supposed to reflect back from the headlights

of the automobiles; that on 17th street there is a concrete surface

and a grade that begins about twenty-seven feet east of the Pennsylvania

tracks and goes up to the railroad crossing; that between the

Pennsylvania tracks and the ... is a ...

gravel between the tracks; that on the northeast corner of 17th

street and Damen Avenue is "a sort of little dog-house"; that

"when you come up to Damen Avenue you have a clear view to the north

for two or three blocks"; "everything is clear"; that the portion of

17th street for west-bound traffic is about thirty feet.

As to the testimony of ...

... the fireman on the rear engine of the train involved in the

accident, testified that the first stop of the train after they left

the Grand Central Station was at 17th street; that he was on the left

side of the engine as he looked forward; that the train left and

passed the engine bell, the automatic bell of the crossing, and

ringing; that the bell was a burning brightly and a slight burning

brightly, the side of the ...

street the engine ...

whistling post, located about eight hundred feet east of the crossing

ing; that he heard the engine ...

long and two short blasts; that ...

looked to the east and saw white ...

that he first saw the car which was struck ...

east of the crossing; that he ...

that it did not stop; that he ...

tracks and ...

miles an hour; that there was a ...

parked between the Pennsylvania tracks and the B. & O. tracks; that when they were just about reaching the crossing he called the engineer's attention to the car of the deceased and the emergency brakes were applied; that the engine was about two hundred feet north of the crossing when the brakes were applied; that they were slowing down at the time for an interlocking plant at Beverly, located about two thousand feet south of 87th street; that as they approached 87th street they were going about forty-five miles an hour; that the train stopped about thirteen or fourteen hundred feet south of 87th street following the accident; that after the engine stopped the bell was still ringing; that he thought the car of the deceased was going to stop; that two other cars that were ahead of the car of the deceased had stopped; that he "could see him sway off the south lane trying to get around the engine;" that from the north going south, starting about fifteen hundred feet north of 87th street and stopping at 87th street there is an appreciable grade in the track; that the tracks are lower at 87th street; that the train could not have been stopped before it reached 87th street if the emergency brake had been applied four hundred feet north; that traveling forty-five miles an hour with two engines it would take twelve hundred feet to come to a stop with an emergency application. Stephen D. Harvey, the engineer of the front locomotive, testified that he started the locomotive bell ringing at 63d street by turning the air valve; that the bell weighed about one hundred pounds, that he did not turn the bell off until after the accident had occurred; that the headlight was turned on at the Grand Central station and was burning brightly and was not turned off or dimmed prior to the accident; that he sounded the regulation crossing whistle, two long and two short blasts, at the whistling post sixteen hundred feet north of 87th street; that he did not see the automobile involved in the accident, that the fireman called his attention to it at the crossing and he applied the emergency application and stopped

parked between the Pennsylvania tracks and the P. & O. tracks; that when they were just about reaching the crossing he called the engineer's attention to the car of the passenger and the emergency brakes were applied; that the engine was about two hundred feet north of the crossing when the brakes were applied; that they were slowing down at the time for an intersecting plant at Beverly, located about two thousand feet south of 87th street; that as they approached 87th street they were going about forty-five miles an hour; that the train stopped about fifteen or sixteen hundred feet south of 87th street following the accident; that after the engine stopped the bell was still ringing; that he thought the car of the deceased was going to stop; that two other cars that were ahead of the car of the deceased had stopped; that he "could see him away off the south lane trying to get around the engine;" that from the north going south, starting about fifteen hundred feet north of 87th street and stopping at 87th street there is an asphalt grade in the track; that the tracks are lower at 87th street; that the train could not have been stopped before it reached 87th street if the emergency brake had been applied four hundred feet north; that traveling forty-five miles an hour with two engines it would take twelve hundred feet to come to a stop with an emergency application. Stephen D. Harvey, the engineer of the front locomotive, testified that he started the locomotive bell ringing at 87th street by turning the air valve; that the bell rang about one hundred pounds, that he did not hear the bell of the second engine when it had occurred; that the locomotive was turned on at the Grand Central station and was running brightly and was not turned off or dimmed prior to the accident; that he sounded the locomotive bell in the whistle, two long and two short blasts, at the station and at the hundred feet north of 87th street; that he did not see the locomotive involved in the accident; that the fireman called his attention to it at the crossing and he applied the emergency application and stopped

within fourteen hundred feet of the crossing; that this was a good stop. H. W. Worman, the engineer of the second engine, testified that the headlight on the first engine burned continuously after they left the depot; that the second engine was working steam as they proceeded south; that he heard the engineer in the first engine whistle for the 87th street crossing before the accident occurred; that the engineer started to whistle at the whistling post about seventeen hundred feet north of 87th street, giving two long and two short blasts; that the train was going about forty-five miles an hour and was stopped within thirteen hundred feet of the crossing; that at that time the automatic bell was ringing and the headlight still burning. Clayton H. Fetter, the fireman on the second engine, testified that he heard two long and two short blasts whistled by the engineer before they got to 87th street; that the first whistle started near the whistling post sixteen hundred or eighteen hundred feet north of 87th street; that he could see the headlight burning on the front locomotive; that he saw deceased's automobile before it was struck; that at that time it was just leaving the westerly track of the two Pennsylvania tracks; that he saw deceased swerve his automobile south just before it was struck; that he saw another automobile standing between the Pennsylvania tracks and the B. & O. tracks waiting for the train to pass; that the bell on the front locomotive was ringing and the headlight burning brightly. Paul Love testified that he witnessed the accident; that he was in a parking lot on the northwest corner of 87th street and Damen avenue; that he first noticed the B. & O. train coming south when it was about a half block north of 87th street; that two fireboxes on the double engine attracted his attention to the train; that the train had a light; that he recalled hearing one whistle north of 87th street; that at that time the train was a little better than a half block north of 87th street; that he did not see deceased's car until it was struck; that he

within fourteen hundred feet of the crossing; that this was a good stop. H. W. Norman, the engineer of the second engine, testified that the headlight on the first engine burned continuously after they left the depot; that the second engine was working as usual; they proceeded south; that he heard the engineer in the first engine whistle for the 7th street crossing before the accident occurred; that the engineer started to whistle at the whistling post about seventeen hundred feet north of 7th street, giving two long and two short blasts; that the train was going about forty-five miles an hour and was stopped within fifteen hundred feet of the crossing; that at that time the automatic bell was ringing and the headlight still burning. Clayton A. Foster, the fireman on the second engine, testified that he heard two long and two short blasts whistled by the engineer before they got to 7th street; that the first whistle started near the whistling post sixteen hundred or eighteen hundred feet north of 7th street; that he could see the light burning on the front locomotive; that he saw deceased's automobile before it was struck; that at that time it was just leaving the western track of the two Pennsylvania tracks; that he saw deceased swing his automobile south just before it was struck; that he saw another automobile standing between the Pennsylvania tracks and the B. & O. tracks waiting for the train to pass; that the bell on the front locomotive was ringing and the headlight burning brightly. And he testified that he witnessed the accident; that he was in a building at the northeast corner of 87th street and Tenth Avenue; that he first noticed the B. & O. train coming south when it was about a half block north of 7th street; that two fireboxes on the locomotive turned his attention to the train; that the train had a light; that he recalled hearing one whistle north of 7th street; and at that time the train was a little better than a half block north of 7th street; that he did not see deceased's car until it was struck; that he

was sitting in his automobile in the parking place when he noticed two engines coming along and spots in the fireboxes, holes, for ventilation; that he heard the roar of the train as it came closer to him; that after the accident he went down to where the train stopped, a block south of 87th street; that he did not recall if the bell was ringing at that time but that the headlight was still burning when he got there; that he "noticed the first engine puffing steam as they were coming down the track." Upon cross-examination he testified that "the sound of the engines attracted my attention to the train." Vernon Blackford, a bus driver, testified that his route ended at Damen avenue and 87th street, just east of the railroad tracks; that just before the accident he was driving west on 87th street; that deceased's car passed his bus about one hundred and fifty feet east of the Damen avenue crossing; that there was another car ahead of deceased's car; that the other car pulled up between the Pennsylvania and B. & O. tracks and stopped; that deceased's car seemed to hesitate as it crossed the first set of tracks but did not stop; that it spurted a little and swerved off in front of the B. & O. train; that it seemed as though deceased stepped on the gas and shot around to the extreme south side of the street when he was struck; that before the accident happened the witness saw the B. & O. train; that he was then about one hundred and fifty feet east of Damen avenue and the train was then a block and a half or more north of the crossing; that he could see the headlight and fireboxes of the train plainly; that when he first noticed the train it whistled and it whistled again when it was about seventy-five feet from the crossing; that he heard, without difficulty, two loud whistles; that at Damen avenue there was nothing to obstruct the view to the north of the approaching train; that he could see down the tracks "three blocks easily, probably more; that there is nothing that obstructs your view as you come along there; that the watchman's shanty does not obstruct your view of trains coming from the north as you go over the crossing; you would have to stop directly in line between

was sitting in his automobile in the waiting place when he noticed two engines coming along and spots in the fireplace, holes, for ventilation; that he heard the roar of the train as it came closer to him; that after the accident he went down to where the train stopped, a block south of 87th street; that he did not recall if the bell was ringing at that time but that the headlights was still burning when he got there; that he "noticed the first engine putting steam as they were coming down the track." Upon cross-examination he testified that "the sound of the engines attracted my attention to the train." Vernon Blackford, a bus driver, testified that his route ended at Damen Avenue and 87th street, just east of the railroad tracks; that just before the accident he was driving west on 87th street; that deceased's car passed him but about one hundred and fifty feet east of the Damen Avenue crossing; that there was another car ahead of deceased's car; that the other car pulled up between the Pennsylvania and B. & O. tracks and stopped; that deceased's car seemed to hesitate as it crossed the first set of tracks but did not stop; that it sprang a little and swerved off in front of the B. & O. train; that it seemed as though deceased stopped on the gas and shot around to the extreme south side of the street when he was struck; that before the accident he planned the witness was the B. & O. train that he was then about one hundred and fifty feet east of Damen Avenue and the train was then a block north of him or more north of the crossing; that he could see the headlights and fireboxes of the train plainly; that when he first noticed the train it sounded as if it whistled again when it was about seventy-five feet from the crossing; that he heard, without intelligibly, two loud whistles; that Damen Avenue there was nothing to obstruct the view to the north of the approaching train; that he could see down the track "toward blocks easily, probably more; the street is not lined with trucks your view as you come along there; in the distance's clearly does not obstruct your view of train coming from the north as you go over the crossing; you would have to stop directly in line between

it and the train in order for it to obstruct your view; that when you are at the crossbuck east of the Pennsylvania track there is nothing to obstruct your view of a train approaching on the B. & O. tracks; that the mound of dirt shown on the left-hand side of plaintiff's exhibit No. 6 does not obstruct your view at all; that the mound is about three feet high." Upon cross-examination the witness testified that the lights of the bus were on at the time he saw the accident; that his lights threw light ahead five hundred feet and illuminated both the cross-buck signs on the right-hand side of the road; that the crossing at 87th street and the tracks was not dark at the time; that his lights illuminated it; that the car of the deceased was going about thirty-five miles an hour at the time of the accident; that the whistle first directed his attention to the train and that he then saw the headlight and the fireboxes.

Zuidema v. Chicago & N. W. Ry. Co., 295 Ill. App. 286, was a suit to recover damages because of a death caused in a crossing accident. In reversing a judgment in favor of the plaintiff, the court said ^{(pp. 288,} 288, 289):

"It has been stated by this court in Moore v. Illinois Power & Light Corp., 286 Ill. App. 445, that it is the duty of a person approaching a place of danger, to do so cautiously and with a proper degree of care for his own safety, having in mind the danger to which he knows he is exposed (p. 445 and cases cited). The above doctrine has been announced in Greenwald v. Baltimore & O. R. Co., 332 Ill. 627, 631, and in Provenzano v. Illinois C. R. Co., 357 Ill. 192, 196, as follows: 'The rule has long been settled in this State that it is the duty of persons about to cross a railroad track to look about them and see if there is danger, and not to go recklessly upon the track, but to take proper precaution to avoid accident. It is generally recognized that railroad crossings are dangerous places, and one crossing the same must approach the track with the amount of care commensurate with the known danger, and when a traveler

on a public highway fails to use ordinary precaution while driving over a railroad crossing, the general knowledge and experience of mankind condemns such conduct as negligence.' The most recent pronouncement of this rule, of which we are aware, will be found in Grubb v. Illinois Terminal Co., 306 Ill. 330, 338."

In Greenwald v. B. & O. R. R. Co., 332 Ill. 627, the court, in denying a recovery in a crossing accident, said (pp. 631, 632, 633):

"The rule has long been settled in this State that it is the duty of persons about to cross a railroad track to look about them and see if there is danger, and not to go recklessly upon the track but to take proper precaution to avoid accident. It is generally recognized that railroad crossings are dangerous places, and one crossing the same must approach the track with the amount of care commensurate with the known danger, and when a traveler on a public highway fails to use ordinary precaution while driving over a railroad crossing, the general knowledge and experience of mankind condemns such conduct as negligence. (Graham v. Hagmann, 270 Ill. 252; Lake Shore and Michigan Southern Railroad Co. v. Hart, 87 id. 529; Chicago, Burlington and Quincy Railroad Co. v. Damerell, 81 id. 450; Toledo, Wabash and Western Railway Co. v. Jones, 76 id. 311.) One who has an unobstructed view of an approaching train is not justified in closing his eyes or failing to look, or in crossing a railroad track in reliance upon the assumption that a bell will be rung or a whistle sounded. No one can assume that there will not be a violation of the law or negligence of others and then offer such assumption as an excuse for failure to exercise care. The law will not tolerate the absurdity of allowing a person to testify that he looked but did not see the train when the view was not obstructed, and where, if he had properly exercised his sight, he must have seen it. (Schlauder v. Chicago and Southern Traction Co., 253 Ill. 154.) The question of due care on the part of a plaintiff is a question for the jury when there

is any evidence given on the trial which, with any legitimate inference that may be legally and justifiably drawn therefrom, tends to show the use of due care, but where the evidence, with all legitimate inferences that may be legally and justifiably drawn therefrom, does not tend to show due care on the part of plaintiff the trial court is justified in instructing the jury to return a verdict for defendant. In this case it seems clear from the testimony of appellant's witnesses, taken in its most favorable light, that appellant's agents, had they continued to look toward the southeast after going upon the tracks, would have seen the approaching train in ample time to have avoided the collision. Appellant's evidence most favorable to him is, that when standing on the first or south track, which the testimony shows is from 30 to 40 feet south of the third track, on which the collision occurred, one can see at least 200 feet in the direction from which the train was approaching. Neither of appellant's servants testified that after going upon the first or south track they again looked toward the southeast until they were crossing the second track. It seems clear that had they done so the collision would have been avoided. They testify that they heard no sound of warning, such as the blowing of a whistle or ringing of a bell. The duty resting upon one who crosses a railroad track is not only to listen but to look, and the fact that no bell was rung or whistle blown, if such was the fact, would not excuse him from using due care to look in the direction from which a train might be coming, and in this case had appellant's servants done so it seems clear that the collision would have been avoided."

In Kutchma v. Atchison, T. & S. F. Ry. Co., 23 Fed. (2d) 183, the court said (pp. 184, 185):

"* * * We have had many of these cases, presenting deplorable accidents, and the rules of law controlling in such a situation have been many times stated. In C., M. & St. P. Ry. Co. v. Bennett, 181 F. 799, 803, we said:

"A railroad track is a constant warning of danger. The engines and trains must run over them so rapidly that their operators cannot alone protect travelers on the highways which cross them. The law requires railroad companies to sound their whistles and ring their bells as their trains approach the crossings, and it also requires travelers on the highways to exercise ordinary care to use efficiently their senses of sight and hearing to prevent collisions. The failure of the servants of the companies to discharge their duties in this regard is no excuse for the failure of travelers on a highway to discharge theirs. The latter are still bound by the law to listen and look effectively before they enter upon a railroad track. Chicago, R. I. & P. Railroad Co. v. Houston, 95 U. S. 697, 702, 24 L. Ed. 542; Schofield v. Chicago, etc., Ry., 114 U. S. 615, 618, 5 S. Ct. 1125, 29 L. Ed. 224; Fletcher v. Atlantic & Pacific R. R. Co., 64 Mo. 484." Many other cases to the same effect might be cited but the rule that governs the instant case is so well established that it is unnecessary to refer to them.

The uncontradicted evidence shows that for some distance east of the hot-dog stand there is a clear view to the north as you proceed west on 87th street. Between the hot-dog stand, located two hundred and four feet east of the B. & O. tracks, and the B. & O. tracks, there is nothing to obstruct the view to the north, unless the watchman's small shanty, located between the Pennsylvania tracks and the B. & O. tracks, be considered an obstruction, and the undisputed evidence is that this shanty could only obstruct your view to the north of you stood in a position where the shanty was directly between you and the train. There was also a riding academy sign between the hot-dog stand and the Pennsylvania tracks, but this sign was elevated upon two posts and was so high that it could not have obstructed the view of the deceased to the north. The deceased had an unobstructed view of the tracks to the north before he reached the hot-dog stand, and as he passed over the one hundred and fifty-seven

feet between the hot-dog stand and the shanty he also had a clear view of the tracks to the north. After he passed the shanty, for the forty-seven feet between the shanty and the B. & O. tracks, he had a clear view of the B. & O. tracks for several blocks, at least. Blackford, the driver of the bus, testified that he saw the B. & O. train approach the crossing when he was about one hundred and fifty feet east of Damen avenue. There were regular railroad cross-arms warning signals on both sides of the crossing and the headlight of the bus "illuminated" the cross-arms and the crossing before and at the time of the accident. The argument of plaintiff's counsel that the bus might have obstructed the view of the deceased to the north is without basis in the evidence, and Blackford testified that the deceased's car passed the bus about one hundred and fifty feet east of the Damen avenue crossing. The further argument of plaintiff's counsel that the automobile that had been traveling alongside the deceased's automobile as both cars approached the track might have obstructed the view of the deceased to the north, hardly merits serious consideration. The uncontradicted evidence is that the other car stopped between the Pennsylvania tracks and the B. & O. tracks. The inference is plain that the driver of that car saw that it would be dangerous to attempt to pass over the B. & O. tracks ahead of the train. Plaintiff argues that the testimony of four witnesses of plaintiff to the effect that they did not hear a whistle sounded or a bell rung prior to the time of the accident should be given great weight. There is no positive evidence that the whistle was not blown or that the bell was not rung as the train approached the crossing. Certain witnesses for plaintiff testified that they saw the train when it was about a block north of 87th street and that they heard the whistle of the train. One of plaintiff's witnesses testified that he saw the headlight on the B. & O. engine before he got to Damen avenue; that the headlight on the locomotive was burning brightly and that he heard the whistle plainly;

test between the north-bound and the south-bound tracks, for view of the tracks to the north. After he passed the crossing, for the forty-seven feet between the tracks and the B. & O. tracks, he had a clear view of the B. & O. tracks for several blocks, at least. Blackford, the driver of the bus, testified that he saw the B. & O. train approach the crossing then he was about one hundred and fifty feet east of the crossing. There were railroad cross-arms warning signals on both sides of the crossing and the headlights of the bus "illuminated" the cross-arms and the crossing before and at the time of the accident. The argument of plaintiff's counsel that the bus might have obstructed the view of the deceased to the north is without basis in the evidence, and Blackford testified that the deceased's car passed the bus about one hundred and fifty feet east of the bus when crossing. The further argument of plaintiff's counsel that the automobile had been traveling alongside the deceased's automobile as both cars approached the track might have obstructed the view of the deceased to the north, hardly merits serious consideration. The undisputed evidence is that one of the cars occupied a lane between the tracks and the B. & O. tracks. The testimony is plain that the driver of that car saw that it would be dangerous to attempt to pass over the B. & O. tracks ahead of the train. Plaintiff argues that the testimony of four witnesses of plaintiff to the effect that they did not hear a whistle sounded or a bell rung prior to the time of the accident should be given great weight. There is no positive evidence that the whistle was not blown or the bell was not rung as the train approached the crossing. Certain witnesses for plaintiff testified that they saw the train when it was about a quarter of a mile from the crossing and that they heard the whistle of the train. One of plaintiff's witnesses testified that he saw the light of the B. & O. engine before he got to the crossing; that the light on the locomotive was burning brightly and that he heard the whistle blowing.

that there was a shrill blast. The evidence of the members of the crew of the B. & O. train is positive that the automatic bell was ringing constantly and that the regulation whistle, two long and two short blasts, was given at the whistling post north of 87th street. The testimony of the bus driver is that he saw the train first when he was about one hundred and fifty feet east of Damen avenue and that the whistle of the train first directed his attention to it. Testimony of several witnesses for plaintiff that they did not hear a whistle sounded nor a bell rung prior to the accident is merely negative in its character and does not tend to raise an issue of fact as to whether the whistle was blown or the bell was rung, where there is positive, unimpeached testimony that the whistle was sounded and the bell was rung. (See Morgan v. New York Cent. R. R. Co., 327 Ill. 339, 343; Urban v. Pere Marquette R. Co., 266 Ill. App. 152, 157; Pere Marquette Ry. Co. v. Anderson, 29 Fed. (2d) 479; Grinestaff v. New York Cent. R. R., 253 Ill. App. 589, 604.) There is no evidence that the deceased looked to the north or south as he approached the crossing and proceeded over it. The evidence is uncontradicted that the deceased never stopped his car from the time that he started across the crossing until the accident. Blackford testified that deceased's car seemed to hesitate between the Pennsylvania tracks and the B. & O. tracks but did not stop, that it sputtered a little and swerved off in front of the B. & O. train, that it seemed as though deceased stepped on the gas and shot around to the extreme south side of the street, when he was struck. All of the witnesses who testified as to the speed of deceased's car place it at about thirty-five miles an hour. The deceased kept on going even when the automobile that had been traveling alongside of his car stopped between the Pennsylvania and B. & O. tracks. It is a matter of common knowledge that a train like the one in question, aside from the ringing of the bell and the blowing of the whistle, makes considerable noise and clatter as it travels between forty-five and sixty miles an hour.

Young, a witness for plaintiff, who was in the car that passed over the B. & O. tracks before the accident, stated that when they were on the B. & O. track he heard a noise and looked around and that he heard the clatter on the engine. English, a witness for plaintiff, testified that as they got closer to the crossing they could hear the noise of the locomotive and train. Paul Love, a witness for defendant, testified that when he noticed the two engines coming along he heard the roar of the train. The second engine on the B. & O. train was "working steam" as it approached the crossing. No other reasonable conclusion can be drawn from the evidence than that deceased, as he started across the tracks, knew that the train was approaching 87th street but that he concluded he could pass over the B. & O. tracks before the train reached the crossing. Blackford's testimony supports this conclusion and there is no evidence that negatives it. If that conclusion is discarded then it must be assumed that the deceased was paying no attention to the dangerous position in which he was placing himself until it was too late to avoid the accident. While the accident to the deceased is to be deplored, we are obliged to find, under the uncontradicted evidence and the law, that he was guilty of contributory negligence which proximately contributed to bring about his death.

The judgment of the Circuit court of Cook county is reversed.

JUDGMENT REVERSED.

Friend, P. J., and Sullivan, J., concur.

Young, a witness for plaintiff, who was in the car first passed over the B. & O. tracks before the accident, stated that when they were on the B. & O. track he heard a noise and looked around and that he heard the clatter on the engine. English, a witness for plaintiff, testified that as they got closer to the crossing they could hear the noise of the locomotive and train. Paul Love, a witness for defendant, testified that when he noticed the two engines coming along he heard the roar of the train. The second engine on the B. & O. train was "working steam" as it approached the crossing. No other reasonable conclusion can be drawn from the evidence than that deceased, as he started across the tracks, knew that the train was approaching 87th street but that he concluded he could pass over the B. & O. tracks before the train reached the crossing. Blackford's testimony supports this conclusion and there is no evidence that negates it. If that conclusion is discarded then it must be assumed that the deceased was paying no attention to the dangerous position in which he was placing himself until it was too late to avoid the accident. While the accident to the deceased is to be deplored, he was obliged to find, under the uncontradicted evidence and the law, that he was guilty of contributory negligence which proximately contributed to bring about his death.

The judgment of the Circuit Court of Cook County is reversed.

REDACTED

Friend, E. J., and Sullivan, J., concur.

41058

FIDELITY COAL COMPANY, a
corporation of Illinois,
Appellant,

v.

ALFRED DIAMOND AND MUTUAL
LIFE INSURANCE COMPANY OF NEW
YORK,
Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

3191A.387

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A verified amended complaint in the nature of a creditor's bill that seeks to enforce the collection of a judgment against defendant Alfred Diamond by reaching the cash surrender value of a certain life insurance policy issued and delivered to Diamond upon the life of Diamond by the Mutual Life Insurance Company of New York, defendant. Each defendant filed a motion to dismiss said complaint, which motions were sustained by the trial court and an order was entered dismissing the amended complaint at plaintiff's costs. Plaintiff appeals.

The amended complaint alleges, in substance, that in January and March, 1933, defendant Diamond, for the purpose of inducing plaintiff to deliver coal to the premises at 3657 West Roosevelt road, Chicago, falsely and fraudulently represented and stated to an agent of plaintiff that he was managing and operating the above mentioned premises for his uncle, one Jacob Diamond, an individual of financial responsibility and known as such to plaintiff, and that he, said defendant, was authorized to purchase coal for said premises; that said statements were made for the purpose of inducing plaintiff to deliver coal on credit and plaintiff relied upon the statements and delivered the coal, as directed by said defendant, on January 2, January 19, and March 3, 1933; that the statements were utterly untrue and false at the time and were known by said defendant to be false, and as a result thereof

FIDELITY COAL COMPANY, a
corporation of Illinois,
Appellant,

APPEAL FROM CIRCUIT COURT,
COOK COUNTY,

ALFRED DIAMOND AND MILDRED
LIFE INSURANCE COMPANY OF NEW
YORK,
Appellees.

MR. JUSTICE SCAMMAM DELIVERED THE OPINION OF THE COURT.

A verified amended complaint in the nature of a creditor's bill that seeks to enforce the collection of a judgment against defendant Alfred Diamond by reaching the cash surrender value of a certain life insurance policy issued and delivered to Diamond upon the life of Diamond by the Mutual Life Insurance Company of New York, defendant. Each defendant filed a motion to dismiss said complaint, which motions were sustained by the trial court and an order was entered dismissing the amended complaint as ineffectual, costs, plaintiff pays.

The amended complaint alleges, in substance, that in January and March, 1935, defendant Diamond, for the purpose of inducing plaintiff to deliver coal to the premises of 307 West Roosevelt Road, Chicago, falsely and fraudulently represented and stated to an agent of plaintiff that he was a manufacturing and operating the above mentioned premises for his uncle, one Jacob Diamond, an individual of financial responsibility and one in a position to purchase plaintiff's coal. Plaintiff was authorized to purchase coal for said premises; this said statement was made for the purpose of inducing plaintiff to deliver coal on credit and plaintiff relied upon the statements and delivered the coal as the same by said defendant on January 1, 1935, and March 1, 1935; that the statements were utterly untrue and false at the time and were known by said defendant to be such, and a criminal conspiracy

plaintiff was damaged; that by virtue thereof said defendant be-
came liable to plaintiff for said damages, and on May 10, 1937,
plaintiff filed in the Municipal Court of the City of New York, setting
these facts in its statement of claim, and sought to enforce said
liability against said defendant in an action of tort and neglect;
that the suit was entitled THE CITY OF NEW YORK, Plaintiff,
formerly known as the Coal Company, a corporation, v. Alfred Diamond
XXXXXXXXXXXXXXXXXXXX Municipal Court No. 30,349; that
on October 11, 1937, a judgment for \$149.75 and costs of suit was
rendered against said defendant, based upon the aforementioned
statement of claim, after a full and complete trial of the issues;
that execution was then set and served upon defendant by the plaintiff
of said court and returned at the expiration of ninety days, proper
endorsed, among other things, "no property found and no part satis-
fied;" that said judgment is still in full force and effect and not
reversed or a writ of certiorari has been granted; that there is now due plaintiff \$149.75,
with interest thereon from date of rendition; that said company
issued and delivered to defendant Diamond an insurance policy on
the life of said Diamond, said policy being numbered 4038944; that
the policy was a cash surrender value of \$150.00; that the premium
on the policy was fully paid and the policy is in full force and
effect; that the policy provides that said company will pay the
cash surrender value only upon payment of the policy to the
company for a cash value; that plaintiff in its statement of claim
sought to recover from said policy to said company but defendant
Diamond has failed and refused to do so and in this possession of
the said policy; "wherefore, plaintiff prays judgment for the
defendant, Alfred Diamond, be awarded and receive the cash value
of the policy to the extent of, and this sum be paid to the company of
New York. (b) That the defendant, Alfred Diamond, surrendering
of New York, be required to accept such policy for a surrender and

pay to the plaintiff, to apply on the judgment, the full cash surrender value of the policy or so much as may be necessary to satisfy the judgment. (c) That a temporary injunction be granted to prevent the defendant, Alfred Diamond, from cancelling or surrendering the policy, withdrawing the proceeds thereof, or from selling, assigning or encumbering it. (d) That a temporary injunction be granted to prevent the defendant, Mutual Life Insurance Company of New York, from accepting said policy from defendant, Alfred Diamond, for cancellation, surrender or assignment, or from forfeiting or lapsing said policy pending the outcome of this case. (e) That plaintiff have such other relief as it may require."

Mutual Life Insurance Company of New York, defendant, filed a verified motion to dismiss plaintiff's amended complaint, and for grounds alleges "that the judgment alleged in the amended complaint is a tort judgment based on 'fraud and deceit' and that no judgment was rendered against defendant, Alfred Diamond, until October 11, 1937. That after July 1, 1937, the proceeds and cash surrender value of life insurance policies payable to wife, child or parent became exempt from execution, attachment, garnishment or other processes for the debts or liabilities of the insured (Chapter 73, Paragraph 850 Illinois Revised Statutes, 1937). That the beneficiary of the policy is the insured's father, Isadore B. Diamond."

Diamond, defendant, filed a verified motion to dismiss the amended complaint "on the grounds that the judgment was entered in the Municipal Court of Chicago on October 11, 1937; that after July 1, 1937, all proceeds and cash values of life insurance policies, payable to wife, child or parent were exempt from execution, attachment, garnishment or other process for the debts or liabilities of the insured (Chap. 73, Par. 850, Ill. Rev. Statutes, 1937); that it appears from the face of the amended complaint that the beneficiary of the policy is the insured's father, Isadore B. Diamond."

pay to the plaintiff, to apply on the judgment, the full cash surrender value of the policy or so much as may be necessary to satisfy the judgment. (c) That a temporary injunction be granted to prevent the defendant, Alfred Diamond, from cancelling or surrendering the policy, withholding the proceeds thereof, or from selling, assigning or encumbering it. (d) That a temporary injunction be granted to prevent the defendant, Mutual Life Insurance Company of New York, from accepting said policy from the defendant, Alfred Diamond, for cancellation, assignment or surrender, or from forfeiting or lapsing said policy pending the outcome of this case. (e) That plaintiff have such other relief as it may require."

Mutual Life Insurance Company of New York, defendant, filed a verified motion to dismiss plaintiff's amended complaint, and for grounds alleges "that the judgment alleged in the amended complaint is a tort judgment based on 'fraud and deceit' and that no judgment was rendered against defendant, Alfred Diamond, until October 11, 1937. That after July 1, 1937, the proceeds and cash surrender value of life insurance policies payable to wife, child or parent become exempt from execution, attachment, garnishment or other processes for the debts or liabilities of the insured (Chapter 73, Paragraph 850 Illinois Revised Statutes, 1937). That the beneficiary of the policy is the insured's father, Isaac R. Diamond." Diamond, defendant, filed a verified motion to dismiss the amended complaint "on the grounds that the judgment was entered in the Municipal Court of Chicago on October 11, 1937; and after July 1, 1937, all proceeds and cash value of life insurance policies payable to wife, child or parent were exempt from execution, attachment, garnishment or other processes for the debts or liabilities of the insured (Chap. 73, Par. 850, Ill. Rev. Statutes, 1937); and it appears from the face of the amended complaint that the beneficiary of the policy is the insured's father, Isaac R. Diamond."

Plaintiff states: "It is the plaintiff's **theory** of this case that the exemptions set forth in Section 238 of the 'Illinois Insurance Code' (Chapter 73, Par. 850, Illinois Revised Statutes, 1937) are not available to the defendant, Alfred Diamond, for the reason that the liability to the plaintiff herein sought to be enforced was incurred in January and March of 1933, the dates upon which the defendant made the **false** and fraudulent statements and the plaintiff completed the deliveries of coal. The entry of judgment at a later date based upon a statement of claim setting forth those facts and dates merely proved conclusively that the liability existed as alleged and provided a means to enforce the same;" and that the court erred in sustaining defendants' motions to dismiss plaintiff's amended complaint and in dismissing said complaint at plaintiff's costs. The theory of defendants is limited to the grounds set up in their motions to dismiss.

The statute in question (chap. 73, par. 850, sec. 238, Ill. Rev. Stat. 1937) provides: "All proceeds payable because of the death of the insured and the aggregate net cash value of any or all life and endowment policies and annuity contracts payable to a wife or husband of the insured, or to a child, parent or other person dependent upon the insured, whether the power to change the beneficiary is reserved to the insured or not, and whether the insured or his estate is a contingent beneficiary or not, shall be exempt from execution, attachment, garnishment or other process, for the debts or liabilities of the insured incurred subsequent to the effective date of this Code, except as to premiums paid in fraud of creditors within the period limited by law for the recovery thereof." (Italics ours.)

In 17 C. J. pp. 1372-1374, the word "debt" is defined as follows: " * * * In a purely technical sense, it is that for which an action of debt or indebitatus assumpsit will lie; a sum of money due by certain and express agreement * * *. In a larger sense, the

(curs.)

In 17 0. 1. 09. 1934-1934, the word "debt" is defined as follows: " * * * in a purely technical sense, it is the sum of an action of debt or indebtedness as against the sum of money due by certain and exact agreement * * *. In a larger sense, it

word means that which one person is bound to pay to another, or to perform for his benefit, a sum of money due from one person to another, whether money, goods, or services * * *." 2 Bouvier's Law Dictionary (Rawle's Third Rev.) p. 1950, defines "liability" as follows: "Responsibility; the state of one who is bound in law and justice to do something which may be enforced by action. McElfresh v. Kirkendall, 36 Ia. 226; Wood v. Currey, 57 Cal. 209; Joslin v. Car Spring Co., 36 N. J. L. 145. This liability may arise from contracts either express or implied, or in consequence of torts committed. The state of being bound or obliged in law or justice. Joslin v. Car Spring Co., 36 N. J. L. 145; McElfresh v. Kirkendall, 36 Ia. 226." (Italics ours.) In 36 C. J. 1050, 1051, the term "liability" is defined as follows: "A broad term, of large and most comprehensive significance, whose meaning has been given many times by judicial decisions, as well as by lexicographers. The term has been variously defined as meaning amenability or responsibility to law; legal responsibility; obligation; responsibility; that condition of affairs which gives rise to an obligation to do a particular thing to be enforced by action; the condition of being actually or potentially subject to an obligation; the condition of being responsible for a possible or actual loss, penalty, evil, expense or burden; the condition of one who is subject to a charge or duty which may be judicially enforced; the state of being bound or obliged in law or justice to do, pay, or make good something; the state of one who is bound in law and justice to do something which may be enforced by action; the state of being liable, the state or condition of one who is under obligation to do at once or at some future time something which may be enforced by action. In a restricted sense, that which one is under obligation to pay to another; that for which one is responsible or liable; that which one is under obligation to pay, or for which one is liable. In a broader sense 'liability' means any

word means that which one person is bound to pay to another, or to perform for his benefit, a sum of money, the from one person to another, whether money, goods, or services * * *. "Liability" Law Dictionary (Amie's Third Rev.) p. 1112, defines "liability" as follows: "Responsibility; the state of one who is bound in law and justice to do something which may be enforced by action. McElfresh v. Kirkendall, 30 Ia. 220; Joelin v. Car Spring Co., 30 N. W. 147. This liability may arise from contracts either express or implied, or from torts committed. The state of being bound or obliged in law or justice. Joelin v. Car Spring Co., 30 N. W. 147; McElfresh v. Kirkendall, 30 Ia. 220." (Ibid. supra.) In 30 N. W. 1092, 1091, the term "liability" is defined as follows: "A broad term, of large and most comprehensive significance, whose meaning has been given many times by judicial decisions, as well as by lexicographers. The term has been variously defined as meaning, amenability or responsibility to law; legal responsibility; obligation; responsibility; that condition of affairs which gives rise to an obligation to do a particular thing to be enforced by action; the condition of being actually or potentially subject to an obligation; the condition of being responsible for a possible or actual loss; penalty, evil, expense or damage; and condition of one who is subjected to a charge or duty which may be judicially enforced; the state of being bound or obliged in law or justice to do, pay, or make good something; the state of one who is bound in law and justice to do something which may be enforced by action; the state of being liable, the state or condition of one who is liable; the state of one or of some thing to be liable to be enforced by action. In a restricted sense, that which one is under obligation to pay to another; that for which one is responsible or liable; that which one is bound to pay, or for which one is liable. In a broader sense 'liability' means any

obligation one is bound in law or justice to perform, including every kind of obligation, and almost every character of hazard or responsibility. It is generally held to include every kind of legal obligation, responsibility, or duty, certainly all such as are measured by a money valuation. Liability may arise from contracts, express or implied, from duty, imposed by law, or judgment of the court, or in consequence of torts committed. It may mean or include burdens imposed by the constitution or statutes. It may exist without the right of immediate action. A liability may be presently enforceable by action, or there may be time given for its performance. By its context the term may be restricted to cover only a liability founded upon a contract, or arising out of the breach of the contract." (Italics ours.)

As plaintiff contends, "there are many forms of obligations and liabilities that strictly speaking and in the technical sense do not constitute 'debts' although all 'debts' are 'liabilities.'" In 17 C.J., p. 1375, the following footnote distinguishes the terms "debt" and "liability:" "'Liability' distinguished. - (1) 'The words "debt" and "liability" are not synonymous, and they are not commonly so understood. As applied to the pecuniary relation of parties, liability is a term of broader significance than debt. The legal acceptance of debt is a sum of money due by certain and express agreement. [See supra text and note 36]. Liability is responsibility; the state of one who is bound in law and justice, to do something which may be enforced by action. This liability may arise from contracts either express or implied, or in consequence of torts committed. [See Liability (25 Cyc. 223)]. If A owes B \$1,000 he is indebted and liable to B for that sum. But if A has spoken slanderous words of B, whereby a right of action has accrued, he has become liable, and it is only after judgment has been obtained that this liability assumes the character of a debt.' McElfresh v. Kirkendall, 36 Iowa 224, 226 [quot Shelby v. Ziegler, 22 Okl. 799,

815, 98 P. 989]. (2) "'Liability" * * * is a word of more extensive signification than "debt."' Pittsburgh, etc., R. Co. v. Clarke, 29 Pa. 146, 152. (3) 'There are many forms of liability that do not constitute a debt in the technical and legal sense of that term.' In re Wheeler, 34 Kan. 96, 98, 8 P. 276. (4) 'Strictly speaking, a "debt" is said "to be contracted," and a "liability incurred;" but, when the term "debt" is interpreted in the enlarged sense, the strict signification of the word "contracted" may also be modified, so as to extend to liabilities other than those directly growing out of the contracts of parties.' Cole v. Aune, 40 Minn. 80, 82, 41 N.W. 934." In Murphy v. Chicago League Ball Club, 221 Ill. App. 120 (certiorari denied, p. xxxi), the First Division of this court, Mr. Justice McSurely writing the opinion, said (p. 126): "A 'debt' is ordinarily that which is then due from one person to another. 'Liability' in its broader sense means any obligation one is bound in law or justice to perform, and is synonymous with 'responsibility.'"

Defendants, in their motions to dismiss, relied solely upon the ground that the exemption statute took effect on July 1, 1937, and that the judgment against defendant was in tort and was not rendered until October 11, 1937. They argue here that the word "liability" in the exemption statute should be limited to liquidated demands, and that as plaintiff's claim arose out of a tort it "did not become a liability until the judicial determination which was after the date that the statute became effective. Hence the defendant is entitled to its benefits." There is no merit in this contention. Diamond "incurred" a "liability" to plaintiff in January and March, 1933, when he obtained the coal from plaintiff by means of certain false and fraudulent representations. It must be assumed from the judgment entered against Diamond that some time prior to June 20, 1935, the date upon which the suit in the Municipal court of Chicago was instituted, he committed the wrong

817, 98 p. 989]. (2) "liability" is a word of more extensive
signification than "debt." (3) "There are many forms of liability that do
not constitute a debt in the technical and legal sense of that term.
In re Wheeler, 34 Kan. 90, 98, 8 p. 276. (4) "strictly speaking,
a 'debt' is said 'to be contracted,' and a 'liability incurred';
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the strict signification of the word 'contracted' may also be modi-
fied, so as to extend to liabilities other than those directly
growing out of the contracts of parties." Bole v. Anne, 40 Minn.
80, 82, 41 N.W. 934. In Griffin v. Chicago & North Western Ry. Co.,
111. App. 120 (circuit court), 4. xxvi, the first division of
this court, Mr. Justice, in writing the opinion, said (p.
120): "A 'debt' is ordinarily that which is taken due from one
person to another. 'Liability,' in its broader sense means any
obligation one is bound in law or justice to perform, and is
synonymous with 'responsibility.'"
Defendants, in their motion to dismiss, relied solely upon
the ground that the exemption statute took effect on July 1, 1937,
and that the judgment against defendant was in fact and was not
rendered until October 11, 1937. They argue here that the word
"liability" in the exemption statute should be limited to liabil-
dated demands, and that as defendant's claim arose out of a tort
it "did not become a liability until the judicial determination
which was given by the court in the judgment rendered on October 11, 1937.
The defendant is entitled to its exemption. There is no doubt in
this connection. Illinois v. American Ry. Co., 101 Ill. 2d 120, 121
January and March, 1937, when the plaintiff's claim was rendered
by means of certain facts and that the exemption statute should
be assumed from the judgment entered on October 11, 1937, that the
prior to June 30, 1937, the claim upon which one was liable in the
circuit court of Chicago was established, and a judgment was rendered

charged in the complaint. If plaintiff upon the trial of said suit could not prove that Diamond "incurred" a "liability" to plaintiff in January and March, 1933, the suit would have failed. The authorities that we have cited hold that a liability may arise in consequence of a tort committed. Defendants devote but a single page to their answer to plaintiff's convincing argument in support of its contention. The answer is a feeble one, indeed. We hold that the exemption act did not apply to plaintiff's judgment and that the trial court erred in sustaining the motions of defendants and in dismissing plaintiff's amended complaint.

Defendants, apparently realizing that the sole ground that they alleged in their motions to dismiss was not tenable, seek to raise in this court a new ground why the judgment order of the Circuit court should be sustained and they devote practically all of their brief to an argument in support of the new ground urged. They now contend that "the cash surrender value of a life insurance policy cannot be reached either by garnishment or by a creditor's bill, unless the insured voluntarily surrenders the policy for cancellation;" that "a court of equity is without the power to compel the insured to apply for the cash surrender value of a life insurance policy or to compel the insured to deliver the policy for cancellation." In their motions to dismiss they do not raise or suggest as a ground for the dismissal of the amended complaint that the cash surrender value of a life insurance policy is not property that can be reached by a creditor's bill and that a court of equity cannot compel surrender of a life insurance policy for the purpose of securing the cash surrender value to apply in satisfaction of a judgment when application is made therefor by a judgment creditor.

"Section 45 of the Civil Practice Act, Cahill's St. ch. 110, par. 173, provides that '(1) All objections to pleadings heretofore raised by demurrer shall be raised by motion. Such

changed in the complaint. The complaint was filed on said
suit could not prove that the "to" to "by" to
plaintiff in January and March 1941, and the plaintiff
The plaintiff said that the complaint was a liability
arise in consequence of a tort committed by the plaintiff
a single page to their names in the complaint, and the
in support of its first claim. The complaint, indeed,
We hold that the complaint was not a liability
ment and that the trial court was not in error in its
defendants and in dismissing the complaint.
Defendants, and the complaint was not a liability
they alleged in the complaint. The complaint, indeed,
rise in this case. The complaint was not a liability
Circuit court should be dismissed. The complaint, indeed,
of their trial to the complaint. The complaint, indeed,
They now contend that the complaint was not a liability
once policy of the complaint. The complaint, indeed,
creditor's bill, and the complaint was not a liability
policy for the complaint. The complaint, indeed,
the power to add in the complaint. The complaint, indeed,
value of a bill, and the complaint was not a liability
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they do not have the power to add in the complaint. The complaint, indeed,
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once policy of the complaint. The complaint, indeed,
bill and the complaint was not a liability
insurance policy. The complaint, indeed,
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Section 1 of the complaint. The complaint, indeed,
the, per. The complaint, indeed,
therefore filed by the complaint. The complaint, indeed,

motion shall point out specifically the defects complained of, and shall ask for such relief as the nature of the defects may make appropriate, such as the dismissal of the action or the entry of a judgment where a pleading is substantially insufficient in law, or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter be stricken out, or that necessary parties be added, or that designated misjoined parties be dismissed, and so forth.'

"This section abolishes demurrers and substitutes a motion in the nature of a special demurrer, in that the motion must point out specifically the defects complained of and ask for such relief as the nature of the defects may make appropriate.

"A motion which fails to allege facts pointing out specifically the defects complained of and to ask for such relief as the nature of the defects may make appropriate, is insufficient in law and will not be entertained by the court.

"The purpose of the Act, in requiring the motion to specifically point out the nature of the defects, is to inform the party against whom the motion is directed what the contention of the party is, so that he may make preparation to meet such contention."

(Hitchcock v. Reynolds, 278 Ill. App. 559, 562, 563. See, also, Messick v. Mohr, 292 Ill. App. 69, 76; Farmer v. Alton Bldg. & Loan Ass'n, 294 Ill. App. 206, 210.)

Defendants will not be heard to raise in this court the new ground of defense. We are not intimating any opinion as to the merits of the new ground of defense sought to be interposed in this court, nor are we called upon to decide the question as to whether the new defense can now be interposed in the trial court.

The order of the Circuit court of Cook county of September 20, 1939, dismissing the amended complaint at plaintiff's costs is reversed and the cause is remanded with directions to the trial

-10-

court to overrule defendants' motions to dismiss and require them to answer plaintiff's amended complaint.

ORDER OF SEPTEMBER 20, 1939, REVERSED
AND CAUSE REMANDED WITH DIRECTIONS.

Friend, P. J., and Sullivan, J., concur.

court to overrule the decision of the court to grant a writ of habeas corpus to the respondent.

On the 10th day of June, 1930, the court granted a writ of habeas corpus to the respondent.

Witness my hand and official seal this 10th day of June, 1930.

41102

MATILDA YOELIN, Administratrix with
the Will Annexed of the Estate of
Michael Gorski, Deceased, et al.,
Plaintiffs,

v.

JOHN KUDLA et al.,
Defendants.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

WALTER WAISHWELL and MARY WAISHWELL,
Intervening Petitioners After Decree,
Appellees.

MATILDA YOELIN, Administratrix,
etc.,
Appellant.

310 I.A. 387²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On November 3, 1939, the following order was entered
in the Circuit court of Cook county:

"On motion of Alex Janoski, Solicitor for Walter
Waishwell and Mary Waishwell, and on due notice to counsel of
record for parties in interest, and this cause having this day
come on to be heard upon the petition of Walter Waishwell and
Mary Waishwell, his wife, and the Court having read said petition,
and heard arguments of counsel in support of and also in opposition
to said petition, and the Court having considered the same and being
fully advised in the premises Finds:

"1. That Walter Waishwell, in Cause No. 37 C 6151,
filed a complaint to foreclose the lien of a certain Trust Deed on
the premises hereinafter described, that a decree of sale was
entered on May 20, 1938, that in said decree the Court found that
Walter Waishwell, plaintiff, had a first lien on said premises
prior and paramount to that of all parties named defendants in
said cause.

"2. That Matilda Yoelin, Administratrix with will
annexed of Michael Gorski, Deceased, and James G. Barsaloux,
Receiver of premises hereinafter described, were named defendants

...to AIDUX WHOT.

Geographical

Interwoven Petitioners After Decree,
Walter Washington and Mary Ellen

MAILED 10/10/54
10/10/54

MR. JUSTICE ROBERTS: I have no objection.

On October 1, 1950, the following order was entered

in the District Court of the United States for the District of Columbia

notis tot revictio. Hecobis x in to notum m.

[illegible]

FILED IN DEPT. OF COMMERCE, NATIONAL BUREAU OF INVESTIGATION

the remains of a building, which was
entered on May 10, 1944, and in said
building, which was a part of the
prior and present and so that all of the
said remains.

III. POLICE AND CRIMINAL JUSTICE SYSTEM

annexed of Michael Gorbunov, December 1944, and then

Receiver of Remises Handling Unit of 1900.

in Cause No. 37 C 6151, filed their appearance and answer and made their defense to said suit; that upon the entry of the decree of sale, said defendants, last named, prosecuted an appeal to the Supreme Court of Illinois in cause No. 24837; that the Supreme Court of Illinois transferred said cause to the Appellate Court of Illinois, First District, that said cause was there docketed as Cause No. 40647; that on May 2, 1939, the Appellate Court affirmed the decree of sale, that a petition for rehearing was filed and was denied on May 20, 1939, that subsequent thereto, said defendants filed in the Supreme Court of Illinois in Cause No. 25325, a Petition for leave to appeal from the decision of the Appellate Court; that said petition for leave to appeal was denied on October 13, 1939, that a petition to reconsider the order of October 13, 1939 was filed and was denied on October 18, 1939.

"3. That Thomas J. Sheehan, one of the Masters in Chancery, on October 19, 1939, issued his Masters Deed to Walter Waishwell and Mary Waishwell, his wife, to the premises hereinafter described.

"4. That James G. Barsaloux, as Receiver, is in possession of the premises in question, that the period of redemption expired on September 22, 1939 and that Walter Waishwell and Mary Waishwell, his wife, are entitled to the possession of the premises hereinafter described.

"It Is Therefore Ordered and Decreed that James G. Barsaloux, Receiver herein, deliver forthwith the following described premises, to-wit: [Here follows a legal description of the premises in question.] to Walter Waishwell and Mary Waishwell, his wife.

"It Is Further Ordered that the rent, if any, collected by the Receiver for the month of November, 1939, be delivered forthwith to Walter Waishwell and Mary Waishwell, his wife, without prejudice to the right of Walter Waishwell, to all rents collected

since May 25, 1937."

Matilda Yoelin, Administratrix with the Will Annexed of the Estate of Michael Gorski, deceased, appeals.

The controversies between the parties to this appeal relative to their rights in the property in question have been before this court three times. See Yoelin v. Kudla, 287 Ill. App. 618 (Abst.); Waishwell v. Doberstein, 300 Ill. App. 341; and Yoelin v. Kudla, 302 Ill. App. 413. In the last two of these cases the Supreme court denied leave to appeal. No petition for leave to appeal from the judgment of this court was filed in the first case. In the opinion filed in the last case Mr. Presiding Justice John J. Sullivan made a full statement of the litigation between the parties and what was decided in the first two cases. It is sufficient to state that in the first of the cases we held that the mortgage given by the Kudlas to Waishwell was a purchase money mortgage and that the Doberstein trust deed given to secure the same constituted a valid lien against the property in question. The appellant in the instant case, as we have heretofore stated, did not attempt to appeal from our decision in the first case. In the second of the cases we affirmed a decree foreclosing the Waishwell lien as a first and superior lien against the property in question. In the third of the three cases we held, inter alia, that the receiver appointed in the first case was for the benefit, first, of the Waishwells, who had applied for an extension of the receivership and had established their superior lien, and that the receivership funds should be first applied to pay the \$1,118 deficiency which remained after foreclosure sale under the Waishwell mortgage. From the instant record it appears that pursuant to the decree of sale, affirmed by this court in the second case, a sale was had on June 21, 1938, and the period of redemption having expired a master's deed issued to Waishwell and his wife, on October 19, 1939. The order of November 3, 1939, which is the one appealed

since May 25, 1937."

Matilda Yoelina, Administrative, with the will annexed of

the Estate of Michael Gorski, deceased, Appellant.

The controversies between the parties to this appeal

relative to their rights in the property in question have been before

this court three times, See Yoelina v. Knudsen, 307 Ill. App. 618

(Abst.); Knudsen v. Dohertstein, 300 Ill. App. 341; and Yoelina v.

Knudsen, 302 Ill. App. 413. In the last two of these cases the Supreme

court denied leave to appeal. No petition for leave to appeal from

the judgment of this court was filed in the first case. In the

opinion filed in the last case Mr. Justice John J. Sullivan

made a full statement of the litigation between the parties and what

was decided in the first two cases. It is sufficient to state that

in the first of the cases we held that the mortgage given by the

Knudsen to Waiswell was a purchase money mortgage and that the

Dohertstein trust deed given to secure the same constituted a valid

lien against the property in question. The appellant in the instant

case, as we have heretofore stated, did not attempt to appeal from our

decision in the first case. In the second of the cases we affirmed

a decree foreclosing the Waiswell lien as a first and superior lien

against the property in question. In the third of the three cases

we held, inter alia, that the receiver appointed in the first case

was for the benefit, first, of the Waiswells, who had applied for

an extension of the receivership and had established their application

lien, and that the receivership funds should be first applied to pay

the \$1,118 deficiency which remained after foreclosure, and under the

Waiswell mortgage. From the instant record it appears that pursuant

to the decree of sale, affirmed by this court in the second case, a

sale was had on June 21, 1938, and the period of redemption having

expired a master's deed issued to Waiswell and his wife, on October

19, 1939. The order of November 3, 1939, which is the one appealed

from in the instant proceeding, merely directs the receiver to deliver possession of the premises to the ~~Waish~~Wells, as grantees under the master's deed issued to them on October 19, 1939, together with the November, 1939, rents. The Waishwells, appellees, as the holders of the master's deed had a clear right to possession of the premises and to rents that accrued after the date of the master's deed, and the order appealed from followed as a matter of course.

After appellant's printed brief had been filed counsel asked that she be given leave to amend her brief by adding thereto the following: "Rozalia Kudla abandoned her appeal by never having the cause [Yoelin v. Kudla, 287 Ill. App. 618] redocketed in the Circuit court within one year from said reversal on November 10, 1936; and the trust deed remains cancelled out by the decree of July 9, 1935." We allowed the amendment.

We will adopt the following answer made by appellees to appellant's contention:

"(a) No where does the record in the present case support the statement of counsel for appellant that the case of Yoelin v. Kudla, 287 Ill. App. 618, was not redocketed in the lower court.

"(b) Even if it appeared in this record that said case was never redocketed or reinstated in the lower court, the position of the appellant would not be improved, since Waishwell proceeded to foreclose his mortgage, obtaining a decree establishing it as a first lien and obtaining title to the premises by sale and Master's deed, as hereinbefore appears. This later decree, which is the subject of the appeal in Waishwell v. Doberstein, 300 Ill. App. 341, would prevail over the earlier decree obtained by appellant in the creditor's suit relating to the same subject matter. (Chicago Theological Seminary v. People, 189 Ill. 439, 447.)

"(c) The case last cited is also authority (p. 454)

for the proposition that even if said case was never redocketed in the lower court, this court's judgment in the Kudla case was not thereby abandoned, as argued by the amendment, but would remain in effect and the lower court must still respect it by conforming its further proceedings therewith.

"(d) Appellant cannot now, after failing to raise any question in the lower court as to reinstatement of the case, be heard to say that the case was not properly reinstated. (Stahl v. Stahl, 220 Ill. 188.)"

We might add that appellant's contention was not raised upon the second nor third appeals and was first raised upon the instant appeal after her printed brief had been filed. The contention is a belated afterthought and is without merit.

Counsel for appellant, in plaintiff's written and oral arguments, disregards the former judgments of this court and the effect of the same, and does not hesitate to criticize the said judgments. We cannot escape the conclusion that appellant's counsel is convinced that all of the former judgments of this court were wrong and that persistency on her part will finally cause us to change our judgments and to decide the former main controversies between the parties in favor of her client. If such an attitude on the part of a counsel were encouraged litigation would never end. We trust that the counsel will realize that she has performed her full duty to her client and will refrain from further appeals that seek to relitigate controversies between the instant parties that have been finally determined by this court and the Supreme court.

The order of the Circuit court, entered November 3, 1939, is affirmed.

ORDER ENTERED NOVEMBER 3,
1939, AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

41125

MARY CATHERINE TAYLOR, formerly
Mary Catherine Udally,

Appellee,

v.

MUNICIPAL EMPLOYES INSURANCE
ASSOCIATION OF CHICAGO, an
Illinois corporation,

Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

310 I.A. 388

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Mary Catherine Taylor, formerly Mary Catherine Udally, sued Municipal Employees Insurance Association of Chicago to recover on a \$1,000 life insurance policy issued by defendant on the life of Frank Udally. Defendant is an association of civil service employees of the City of Chicago, organized for the mutual benefit and assistance of said employees. The jury returned a verdict of not guilty. Thereupon plaintiff filed a motion for a new trial, a motion for judgment non obstante veredicto and a petition for attorneys' fees on the ground of vexatious delay in the payment of the policy. The court entered the following order:

"On motion of Cornelius R. Palmer, attorney for plaintiff, for a new trial and an additional motion for a judgment non obstante veredicto and due notice having been served and the motions being duly argued before the court by the respective attorneys,

"Be it and it is hereby ordered that a judgment be entered for the plaintiff on her motion non obstante veredicto and also the court certifies that it would have entered an order for a new trial had this motion for judgment non obstante veredicto not been entered.

"It is further ordered on petition of the plaintiff by her attorney for attorney fees and interest for defendant's wilful refusal to pay the amount of the policy of \$1000 to the plaintiff that the judgment include \$250 for plaintiff's attorney fees and the sum of \$100 as interest or a total and final judgment for the plaintiff in the sum of \$1350."

Defendant appeals.

In the view that we have taken of this appeal we deem it necessary to consider only two contentions raised by defendant:

(1) "The verdict of the jury finding defendant not guilty was fully sustained by the evidence and the trial Court erred in entering judgment notwithstanding the verdict," and (2) "Assessing damages and imposing a penalty of \$250 attorney fees and \$100 interest in spite of the not guilty verdict of the jury was unwarranted under the pleadings, evidence and circumstances of this case."

MARY CATHERINE TAYLOR, formerly
Mary Catherine Uebly,
Appellee,

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY,

MUNICIPAL EMPLOYEES INSURANCE
ASSOCIATION OF CHICAGO, INC.
Illinois corporation,
Appellant.

MR. JUSTICE SOANMAN DELIVERED THE OPINION OF THE COURT.

Mary Catherine Taylor, formerly Mary Catherine Uebly, sued

Municipal Employees Insurance Association of Chicago to recover on a

\$1,000 life insurance policy issued by defendant on the life of

Frank Uebly. Defendant is an association of civil service employees

of the City of Chicago, organized for the mutual benefit and assa-

lance of said employees. The jury returned a verdict of not guilty.

Thereupon plaintiff filed a motion for a new trial, a motion for

judgment non obstante veredicto and a petition for attorneys' fees

on the ground of vexatious delay in the payment of the policy. The

court entered the following order:

"On motion of Cornelius R. Palmer, attorney for plaintiff,
for a new trial and an additional motion for judgment non obstante
veredicto and due notice having been served and the motions being
duly argued before the court by the respective attorneys,

"Be it and it is hereby ordered that a judgment be entered
for the plaintiff on her motion non obstante veredicto and also the
court certifies that it would have entered an order for a new trial
had this motion for judgment non obstante veredicto not been entered.

"It is further ordered on petition of the plaintiff by her
attorney for attorney fees and interest for defendant's delay
refusal to pay the amount of the policy of \$1,000 to the plaintiff
that the judgment include \$1,000 for plaintiff's attorney fees and the
sum of \$100 as interest on a legal and final judgment for the
plaintiff in the sum of \$1,100."

Defendant appeals.

In the view of the law and the facts of this case it

is necessary to consider only two contentions raised by a plaintiff:

(1) "The verdict of the jury finding defendant not guilty was fully

sustained by the evidence and the trial court erred in granting this

judgment notwithstanding the verdict," and (2) "Assessing damages and

imposing a penalty of \$250 attorney fees and \$100 interest in spite

of the not guilty verdict of the jury was unwarranted under the cir-
cumstances and circumstances of this case."

The policy was issued on July 1, 1937, upon a written application signed by the insured. It was issued upon the written application, alone, without any medical examination of the insured. The latter was an employee of the City of Chicago and was forty-nine years of age at the time of the issuance of the policy. He was a member of the Municipal Employees Society of Chicago, which consists of civil service employees of the city who contribute to the Municipal Employees Annuity and Benefit Fund and who care to join the society. One of the privileges of the members of the society is the right to borrow money through the Chicago Municipal Employees Credit Union. The notes of the members are taken as evidence of the indebtedness and they are sometimes required to assign their life insurance to the Credit Union as collateral security. The members, if they so desire, may obtain an insurance policy from the defendant association. On July 1, 1937, Frank Udally, the deceased, made a loan of \$500 from the Chicago Municipal Employees Credit Union and at the same time, as part of the same transaction, he applied for a life insurance policy on his life and signed a written application for the policy. The manager of the defendant association testified that the question as to whether the application should be a medical or non-medical case depended upon the answers made to certain questions in the application; that if all the pertinent questions relating to health are answered in the negative the association relies upon the answers and the application becomes a non-medical case, but that where the applicant states that he has had a particular or definite disease or has been treated by a doctor, the association requires a medical examination; that if an applicant stated that he had had sclerosis of the liver his application would be rejected; that if he stated that he had been treated by a physician within five years the association would require a medical examination. The application signed by the deceased contained, inter alia, the following questions and answers:

"17. Health Record. Have you within past five years received treatment or consulted any physician or practitioner? None

"Details _____

The policy was issued on July 1, 1937, upon a written application signed by the insured. It was issued upon the written application, alone, without any medical examination of the insured. The latter was an employee of the City of Chicago and was forty-nine years of age at the time of the issuance of the policy. He was a member of the Municipal Employees Society of Chicago, which consists of civil service employees of the city who contribute to the Municipal Employees Annuity and Benefit Fund and who are to join the society. One of the privileges of the members of the society is the right to borrow money through the Chicago Municipal Employees Credit Union. The notes of the members are taken as evidence of the indebtedness and they are sometimes required to assign their life insurance to the Credit Union as collateral security. The members, if they so desire, may obtain an insurance policy from the defendant association. On July 1, 1937, Frank Ugalis, the deceased, made a loan of \$500 from the Chicago Municipal Employees Credit Union and at the same time, as part of the same transaction, he applied for a life insurance policy on his life and signed a written application for the policy. The manager of the defendant association testified that the question as to whether the application should be a medical or non-medical case depended upon the answers made to certain questions in the application that if all the pertinent questions relating to health are answered in the negative the association relies upon the answers and the application becomes a non-medical case, but that where the applicant states that he has had a particular or definite disease or has been treated by a doctor, the association requires a medical examination; that if an applicant stated that he had had a disease of the liver his application would be rejected; that if it had been rejected by a physician within five years the association would require a medical examination. The application signed by the deceased contained, inter alia, the following questions and answers:

"17. Health Record. Have you within past five years received treatment or consulted any physician or practitioners? None

"Details

"Name and address of physician _____

"Have you ever had, or consulted a physician for:

Rheumatism, Influenza, Cancer, Tumor, Syphilis, Tuberculosis of any part of the body, disease of Heart or Blood Vessels, any affection of the Chest or Throat, Stomach or Bowel Trouble, Indigestion, Appendicitis, Painful Urination, any Disease of Kidneys or Bladder, Dysentery, Brain or Nervous System, Fits, Paralysis, Nervous Breakdown, Insanity, Ear Trouble, or surgical operations? No

"If 'Yes' underline each ailment or injury and in the space opposite specify each ailment or injury giving number of attacks, dates, duration, severity and result. Give name and address of physicians consulted. (Always give dates.)

"Dr. _____

(Street Address - City)

"18. Have you now, or have you ever had, any disease, deformity, accident or injury other than listed above? (Give full details, dates, etc.) No"

Frank Udally died in the Edward Hines Jr. Hospital on October 4, 1937, sixty-four days after the issuance of the policy. ~~On October 4, 1937,~~ Plaintiff, the beneficiary of the policy, furnished to the society proofs of death consisting of a death certificate, claimant's statement and physician's statement. These documents were all introduced in evidence by plaintiff. The medical certificate of death, signed by Dr. Chas. P. Murphy, of the Edward Hines Jr. Hospital, certifies, inter alia, that the doctor treated Udally for fourteen days; that Udally died at the hospital October 4, 1937. The certificate contains the following:

"The principal cause of death and related causes of importance were as follows:

"Uremia	Date of onset 6 wks
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"Other contributory causes of importance:

"Cirrhosis of liver	1 yr.
"Secondary Anemia	6 wks.

Name and address of physician

Have you ever had, or consulted a physician for:

Rheumatism, Influenza, Cancer, Tumor, Typhoid, Tuberculosis of

any part of the body, disease of Heart or Blood Vessels, any

affection of the Chest or Throat, Stomach or Bowel Trouble, Indiges-

tion, Appendicitis, Painful Urination, any disease of kidneys or

Bladder, Dysentery, Brain or Nervous System, Fits, Paralysis, Ner-

vous Breakdown, Insanity, War trouble, or surgical operations? No

If 'Yes' underline each ailment or injury and in the

space opposite specify each ailment or injury giving number of

attacks, dates, duration, severity and result. Give name and address

of physicians consulted. (Always give dates.)

Dr.

(Street Address - City)

18. Have you now, or have you ever had, any disease,

deformity, accident or injury other than listed above? Give full

details, dates, etc. } No

Frank Udell died in the Edward Hines Jr. Hospital on

October 4, 1937, sixty-four days after the issuance of the policy.

~~xxxxxxxxxxxx~~ Probable, the beneficiary of the policy, fur-

nished to the society proofs of death consisting of a death certifi-

cate, claimant's statement and physician's statement. These docu-

ments were all introduced in evidence by plaintiff. The medical

certificate of death, signed by Dr. Cress, P. Murphy, of the Edward

Hines Jr. Hospital, certifies, inter alia, that the doctor treated

Udell for fourteen days; that Udell died in the hospital October 4,

1937. The certificate contains the following:

"The principal cause of death and related causes of

importance were as follows:

Date of onset
0 yrs

Uremia

"Other contributory causes of importance:

1 yr.
6 mos.

"Cirrhosis of liver
"Secondarily Anemia

"Cardiac enlargement 6 wks

"23. (Was an operation performed? No Date of _____
(For what disease or injury? _____

"Was there an autopsy? No

"What test confirmed diagnosis? Laboratory, Physical X-ray"

The claimant's verified statement furnished to defendant contained the following:

"7. State cause of death. Note - State fully all facts and particulars regarding last illness and death. Attach newspaper clippings of death. Uremia

"8. When was health of deceased first affected? Sept. 19, 1937

"9. When did deceased first consult physician? August 1937

"10. On what date did deceased last attend to his usual work?
Sept. 19, 1937

"11. Names and addresses of all physicians who attended deceased during his last illness and during three years prior thereto: Name Dr. Hohner Address Hines Hospital Date of Attendance 9-20 to Oct. 4 Disease or Condition Uremia

"Name Dr. Szubczynski Address 5019 Pensacola Ave
Date of Attendance 8 _____ Disease or Condition Nervous Dyspepsia"

Attached to the proofs of death furnished defendant by plaintiff was a verified "physician's statement," signed by Dr. J. J. Hohner, connected with the Hines hospital. This statement contained, inter alia, the following answers:

"3. Give particulars of each condition for which you treated or advised deceased prior to last illness with date, duration and result:

"Nature of Condition	Date	Duration	Result
"Uremia		6 weeks	deceased
"Cirrhosis Liver		1 year	deceased
"Sec Anemia		6 weeks	deceased
"Cardiac enlargement		6 weeks	deceased

"4. How long had you known deceased? During hospitalization

"5. a. Date of death? a. Oct. 4, 1937

"Cardiac enlargement
(Was an operation performed? No Date of _____)
"S3. (For what disease or injury? _____)

"Was there an autopsy? No

"What test confirmed diagnosis? Laboratory, Physical X-ray"

The claimant's verified statement furnished to defendant contained

the following:

"7. State cause of death. Note - State fully all facts and par-
ticulars regarding last illness and death. Attach newspaper clippings

of death. Uremia

"8. When was health of deceased first affected? Sept. 19, 1937

"9. When did deceased first consult physician? August 1937

"10. On what date did deceased last attend to his usual work?

Sept. 19, 1937

"11. Names and addresses of all physicians who attended deceased

during his last illness and during three years prior thereto: Name

Dr. Hohner Address _____ Hospital Date of Attendance 8-20 to

Oct. 4 Disease or Condition Uremia

"Name Dr. Szabozyanski Address 2019 Panoscola Ave

Date of Attendance 8 _____ Disease or Condition Nervous

Dyspepsia"

Attached to the proofs of death furnished defendant by plaintiff

was a verified "physician's statement," signed by Dr. L. J. Hohner,

connected with the Hines Hospital. This statement contained, inter

alia, the following answers:

"3. Give particulars of each condition for which you treated or

advised deceased prior to last illness with date, duration

and result:

Result	Duration	Date	Nature of Condition
deceased	6 weeks		"Uremia
deceased	1 year		"Cirrhosis liver
deceased	6 weeks		"Gec anemia
deceased	6 weeks		"Cardiac enlargement

"4. How long had you known deceased? During hospitalization

"5. a. Date of death? b. Oct. 4, 1937

- b. Place of death?
- c. If in a hospital or institution, give name.

b. Hines Vet Fac Hines, Ill.
c.

- "6.
- a. What was the immediate cause of death? (See Instructions)
 - b. How long, in your opinion, did deceased suffer from this disease or impairment?
 - c. What were the contributory causes of death? Give, as nearly as you can by dates, the duration of each.
 - d. Was death due to suicide, homicide or accident?

a. Uremia

b. Approx 6 weeks
c. Cirrhosis liver 1 year
Sec Anemia 6 wks
Card. enlargement 6 weeks

d. No

- "7. Had deceased any other disease, acute or chronic? If so, describe giving date and duration.

Nephritis glomerular c
poor renal functions,
Hypertension art sev.
Fibrosis myocardium
arteriosclerosis,
peripheral mod.
retinitis acute
albuminous.

- "8. Was the health of deceased impaired or was death caused directly or indirectly by the use of alcoholic beverages or narcotics?

Undet.

- "9. a. When were you first consulted by deceased, or by any relative or friend, for the condition which either directly or indirectly caused death?
b. Date of last visit?

a. 9/20/37
b. Oct. 4, 1937"

From these documents it appears that the insured had been treated by Drs. Norbert F. Szubczynski, Henry G. Lescher, Chas. P. Murphy and J. J. Hohner. Plaintiff called as a witness Dr. Lescher, who testified that plaintiff was a nurse and he had known her for about five years, but he had only known the deceased for a few months prior to his death. The doctor's acquaintance with the deceased was entirely professional. The doctor testified that he saw the deceased at his office on June 30, 1936; that "a man could not have sclerosis of the liver and not know it. At a certain stage of the disease certain symptoms will be evident. A person could not have such symptoms as vomiting and a yellowish or jaundiced appearance about the white of the eyeballs without being aware that he had sclerosis of the liver. The patient would first be aware of an enlargement of the abdomen,

III. The first part of the report.

10. 11. 1941

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From these documents it appears that the insured had been treated by Drs. Norbert F. Sandberg, Henry G. Leach, Chas. F. Murphy and J. J. Jenner. Plaintiff relied on a note of Dr. Leach, who stated that Plaintiff was a male and he had known her for about five years, but he had only known the deceased for a few months prior to his death. The doctor's acquaintance with the deceased was entirely professional. The doctor testified that he saw the deceased at his office on June 30, 1936; that "a man told me I have relatives of the liver and not know it. At a certain stage of the disease a person will be jaundiced. A person could not have such symptoms as vomiting and a yellowish or jaundiced appearance about the white of the eyes without being aware that he had some trouble of the liver. The patient would first be aware of an enlargement of the liver."

difficulty in bowel movement and itching of the skin, and these things become more intense. He would not necessarily have to have a jaundiced or yellowish condition of the eyeballs. There is a possibility that a man who had those symptoms might not know he had sclerosis of the liver, but he would certainly look into it. I gave Mr. Udally a physical examination including his diaphragm in 1936 but noted no swelling of the liver at that time. That was also true when I examined him in October, 1936, nor did he have discoloration of the eyeball at that time. He had no vomiting or nausea or pronounced belching. Upon careful examination I did not discover that he had sclerosis of the liver at that time." Upon cross-examination the doctor testified: "In sclerosis of the liver there is in addition to a distress in the liver region a condition of indigestion in the stomach. Also there may be vomiting, yellowish discoloration of the skin, light colored movements. There may be spots on the skin but as a rule there is no blood in the urine or the bowels. If there would be blood in the urine or the bowels it would not be due to sclerosis of the liver. The veins around the abdomen are enlarged or extended and appear blue in the late stages of sclerosis. Sclerosis is a disease which comes gradually and has a gradual progress. There is a gradual deterioration of the liver and the other organs involved. Sclerosis of the liver is not the kind of disease that would not manifest itself in October, 1936, and be present in February, 1937, a period of four months. Sclerosis of the liver manifests itself from six to eight months before diagnosis, and the prognosis is usually grave. By grave I mean there is very little outlook for a long life. The terminal evidences or manifestations of sclerosis of the liver could include other conditions as well as uremia, usually there is a heart condition. I could not tell you offhand how many cases of this kind I have observed. I have observed sclerosis of the liver in which there was no uremic complication. Usually the end comes from either a heart condition, a malignant

difficulty in bowel movement and itching of the skin, and these things become more intense. He would not necessarily have to have a jaundiced or yellowish condition of the eyeballs. There is a possibility that a man who had those symptoms might not know he had sclerosis of the liver, but he would certainly look into it. I gave Mr. Udaly a physical examination including his diagnosis in 1936 but noted no swelling of the liver at that time. That was also true when I examined him in October, 1936, nor did he have discoloration of the eyeball at that time. He had no vomiting or nausea or pronounced belching. Upon careful examination I did not discover that he had sclerosis of the liver at that time. "Upon cross-examination the doctor testified: "In sclerosis of the liver there is in addition to a distress in the liver region a condition of indigestion in the stomach. Also there may be vomiting, yellowish discoloration of the skin, light colored movements. There may be spots on the skin but as a rule there is no blood in the urine or the bowels. If there would be blood in the urine or the bowels it would not be due to sclerosis of the liver. The veins around the abdomen are enlarged or extended and appear blue in the late stages of sclerosis. Sclerosis is a disease which comes gradually and has a gradual progress. There is a gradual deterioration of the liver and the other organs involved. Sclerosis of the liver is not the kind of disease that would not manifest itself in October, 1936, and be present in February, 1937, a period of four months. Sclerosis of the liver manifests itself from six to eight months before diagnosis, and the prognosis is usually grave. By grave I mean there is very little outlook for a long life. The terminal evidence or manifestations of sclerosis of the liver could include other conditions as well as uremia, usually there is a heart condition. I could not tell you offhand how many cases of this kind I have observed. I have observed sclerosis of the liver in which there was no uraemic complication. Usually the end comes from either a heart condition, a malignant

condition of the liver or it can be an extension of malignancy. A malignant condition of the liver would be a cancerous condition rather than a sclerotic one. Death can come either from the heart condition, kidney condition or a general complicated condition such as renal cardiac vascular condition. By renal I mean the kidney. The function of the kidney is to excrete the toxins from the body by means of urination. Not in all cases is there a complication of the urine. There could be a dropiscal condition. In very few cases uremia is present. From the condition shown on the statement of death it could be considered a typical picture of cirrhosis of the liver having its terminal end. Yes, I examined this man in June and October of 1936. I did not find present any symptoms of sclerosis of the liver on those examinations. My examination was general. I treated him for bronchitis and for a cold and prescribed for him. I gave him a general examination and went over his chest and abdomen. Had he had any symptoms of sclerosis of the liver I would have discovered it then. It is probable that he could have been examined for sclerosis of the liver at the time I examined him and acquired it later. He came to me three times in the course of twenty-four days. He did not consider his condition dangerous. Cystitis is an affliction of the bladder which has to do with the passing of urine. The bladder is connected to the kidneys. The kidneys are affected by the presence of sclerosis of the liver. In cirrhosis there is a connection between the liver, the bladder and the kidneys." Upon redirect the doctor testified that there was no connection between the cystitis from which the deceased suffered and the sclerosis of the liver; that on October 30, 1936, the last time he examined the deceased, he found no symptoms of the condition of sclerosis of the liver; that in his opinion it would take about six or eight months for sclerosis of the liver to develop, that it comes on gradually but it might take a little longer; that a person might suffer from sclerosis of the liver for a short time and die, or he might linger for years and then die, but

condition of the liver or its capsule - extension of the right lobe.
A malignant condition of the liver would be a serious condition
rather than a self-cure. But it can come from the heart
condition, kidney condition or a general complicated condition such
as renal cardiac vascular condition. It would mean the kidney.
The function of the kidney is to excrete the toxins from the body
by means of urination. But in all cases there is a complication of
the urine. There could be a physical condition. In very few cases
urine is present. From the condition shown on the statement of death
it could be considered a physical picture of cirrhosis of the liver
having its terminal end. Yes, I examined him in June and
October of 1936. I did not find present any symptoms of cirrhosis
of the liver on those examinations. My examination was general. I
treated him for bronchitis and for a cold and prescribed for him.
I gave him a general examination and went over his chest and abdomen.
Had he had any symptoms of cirrhosis of the liver I would have dis-
covered it then. It is probable that he could have been examined
for cirrhosis of the liver at the time I examined him and I missed it.
Later. He came to me three times in the course of twenty-four days.
He did not consider his condition dangerous. Cirrhosis is an enlargement
of the bladder which has to do with the passage of urine. The bladder
is connected to the kidneys. The kidneys are affected by the presence
of cirrhosis of the liver. In cirrhosis there is a connection between
the liver, the bladder and the kidneys. Upon leaving the doctor
testified that there was no connection between the cystitis from
which the deceased suffered and the cirrhosis of the liver; that on
October 30, 1936, the last time he examined the deceased, he found no
symptoms of the condition or cirrhosis of the liver; that in his
opinion it would take about six or eight months for cirrhosis of the
liver to develop, that it comes on gradually and it might take a little
longer; that a person might suffer from cirrhosis of the liver for a
short time and die, or he might linger for years and then die, but

that usually it is a long-drawn-out sickness.

Defendant called Dr. Szubczynski, who testified that he was on the staff of St. Anne's Hospital, also the Belmont Hospital; that he met the deceased for the first time at his office in August, 1937, at which time the beneficiary was also present; that the deceased complained of being ill; that he made a physical examination of the deceased; that deceased complained of severe gastric distress, of belching or hyperemesis, of a sour nature; at times of vomiting; lack of strength, and sort of a distension after eating; that he noticed that the deceased had a sort of yellowish tinge to his skin; that he was thin and emaciated and slightly jaundiced; that the abdomen showed a little protuberance about the region of the liver; that he ascertained by palpitation that there was somewhat of an enlargement of the liver; that he came to the conclusion that it was a case of hyperemia of the liver, an inflammation of the liver; that he saw the deceased on and off on an average of two or three times a month; that deceased came to his office in all about twelve times; that plaintiff told him that she had been a nurse at St. Anne's Hospital; that he concluded from the beginning of his treatment of the deceased that he had sclerosis of the liver; that his condition steadily grew worse; that as near as he could tell he treated the deceased for six or eight months after he first saw him; that he could not tell how long a time elapsed between the time that he last saw the deceased and the time of the latter's death; that after the death of the deceased the beneficiary requested him to furnish a medical certificate to the Municipal Employees Society and he did so. Upon the request of plaintiff defendant's counsel produced the statement of Dr. Szubczynski, which plaintiff introduced in evidence. It reads as follows:

"Dr. N. F. Szubczynski
Physician and Surgeon
5017 Pensacola Ave.
Chicago

"February 10th, 1938.

"Municipal Employes Insurance Assoc. of Chicago
"188 W. Randolph St.
"Chicago.

"Gentlemen:

"This statement verifies the fact, that for a period of about 2 yrs. Mr. Frank Udally was under my professional care on an average of twice or three times a month, he would visit me at my office.

"Mr. Udally was treated by me for Scleroses of the liver & its accompanying gastric disturbances.

"Cordially yours,

"Norbert F. Szubczynski, M.D."

Upon cross-examination the doctor testified that unless he had the year wrong he first saw the deceased in August of 1937; that he knew he treated him for six or eight months; that he had read his statement to the defendant association, and it was correct. The witness was asked if a year and a half before the time of the trial counsel for plaintiff called him on the telephone and asked him if he were not mistaken about the length of time that he had treated the deceased, and if he had not stated to the attorney that he had treated the deceased for a period of two months, to which question the doctor replied, "I cannot quite recollect that so as to truly answer that last statement of yours." The doctor further stated that it was possible that he had made that statement to counsel but that he must have treated the deceased for more than two months; that he did not recall that plaintiff called him on the telephone and asked him as to the correctness of the statement that he had made to the defendant; that "things I stated in that letter were fresher at that time than they are now and when I made it it contained the best available information." The doctor also testified that he, the witness, had been ill for over a year. Plaintiff testified that to the best of her knowledge her husband had never gone to see Dr. Szubczynski prior to July, 1937; that he went to see him once to her knowledge, but that he may have gone more times when she did not know about the visits; that after she read the letter of Dr.

"Municipal Employees Insurance Assoc. of Chicago
188 W. Randolph St.
Chicago, Illinois."

"gentlemen"

"This statement verifies the fact that after treatment of about
2 yrs., Mr. Frank Uebly was under no professional care or observation
of twice or three times a month he would visit me at my office.
"Mr. Uebly was treated by me for colicosis of the liver & its
accompanying gastric disturbances.

"Corilla, No. 2,"

"G. I. Izmaylovich, F. I. Iordani"

Upon cross-examination the doctor testified that unless he had "the year wrong" he first saw the deceased in August of 1937; that he knew he treated him for six or eight months; that he had read his statement to the defendant's association, and it was correct. The witness was asked if a year and a half before the time of the trial counsel for plaintiff called him on the telephone and asked him if he were not mistaken about the length of time that he had treated the deceased, and if he had not talked to the attorney that he had treated the deceased for a period of two months, to which question the doctor replied, "I cannot quite recollect that so as to truly answer that last statement of yours." The doctor further stated that it was possible that he had made that statement to counsel but that he must have treated the deceased for more than two months; that he did not recall that plaintiff called him on the telephone and asked him as to the correctness of his statement that he had made to the defendant; that "I think I stated in what I then was treating at that time that they are now and when I think it is correct, the best available information." The doctor also testified that he, the witness, had been ill for over a year, finishing treatment that to the best of his knowledge was finished in November, 1937, and that he went to the hospital prior to July, 1937; that he went to the hospital to the knowledge, but that he may have gone some time before the time he knew about the witness; and after she gave the doctor the letter.

Szubczynski to defendant she called up the doctor on the telephone and told him that the statement he had made to defendant that he had treated her husband for two years was not correct, to which the doctor said, "I only treated him for two months;" that he had only known her husband for about two months before his death. Cornelius R. Palmer, attorney for plaintiff at the time of the trial and now, testified that after he saw the letter of Dr. Szubczynski to defendant he called up the doctor on the telephone and asked him if the statement in the letter that he had treated the deceased for two years was correct, to which the doctor responded, "No, that is an error. * * * It should be '2 months.' * * * I only knew him for a little over two months prior to his death."

At the close of the evidence defendant filed a motion to instruct the jury to find it not guilty. Thereupon the court stated: "The Court: I am mystified in these insurance company cases; they come into chambers and they say, 'Why, it is a rank case, it is such an outrageous case, such misrepresentation.' I say every member of the insurance company that has notice of this case, - I will bet they would not issue a dozen policies a month. But the only thing here anyway by way of misrepresentation was that this man had been to a doctor for a cold in October of the preceding year, - I mean on a careful, honest investigation of the facts. This Dr. Szubczynski, whatever his name is, did not have a record. His testimony was most unsatisfactory, and an honest investigation of his office would have disclosed that he never examined this man until after he had this insurance. I will say more, an honest examination would have disclosed that fact. And they come in here and say the company is outraged because of the imposition that this man has made upon the company; and the only thing is in the fact he had a cold the previous year 'and we want you to keep him from getting his insurance because he had a cold.' Now I undertake to say if your members knew that you take that position, they would tear up their policies now and throw

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them away. Mr. Selinger [attorney for defendant]: They know it now. The Court: They all know that. I do not see how this case - I don't think I could justify the granting of the motion for a directed verdict for plaintiff, while I would like to. Mr. Palmer: I think it is proper. The Court: I will say this, if you do not get a verdict I will set it aside. Mr. Selinger: I of course object to the Court's remarks. The Court: You may not think so, but that is my view of it. So let's take a recess to 2:00 o'clock." Thereupon the attorney for plaintiff presented a motion and an instruction for a directed verdict in favor of plaintiff. The court reserved his rulings on both motions.

After the jury had returned a verdict in favor of defendant the following proceedings were had:

"Mr. Palmer: If the Court please, this comes up upon a motion for a new trial, and I have presented to your Honor, in addition to that, a certificate asking that in the event your Honor wishes to enter a judgment notwithstanding the verdict, that you also certify that had that not been entered that you would have given a new trial.

"Mr. Selinger: If the Court please, I move now that the Court enter an order dismissing the defendant and enter a judgment of not guilty in this case, based upon what I have already read to the Court.

"The Court: Well, I will grant the plaintiff's motion. Of course, I would have had to grant a motion for a new trial anyway; I would rather grant this motion and dispose of the case.

"I don't think anybody with experience, - that is, I told the jury when they brought in the verdict, I hardly knew of a verdict that was more clearly overrun against the manifest weight of the evidence than this verdict was. I interrogated them and asked them how they could arrive at such an absurd verdict. The point of one individual - I asked them, as a matter of curiosity, how they could arrive at such an absurd result, and they all pointed to one person and said he intimidated them and browbeat them and insulted them and they almost came to report him to the Court because of his in-

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sulting treatment; so it was a one-man verdict. I just could not conceive of how twelve persons would arrive at such a ridiculous verdict as that, to say that because a person had gone to a doctor and was treated for a cold a year before, that that was a material misrepresentation. But this was in force and effect. The Court does not decide against a witness under those circumstances. But this did not ring true to human nature. Even the doctor was impeached by every token, by his appearance, by his inconsistencies, by his testimony, by his - by every yardstick, by every rule, he just was utterly to be disbelieved. The only witnesses that the insurance company had - you could not believe that this insured had sclerosis of the liver. So I would have to grant them a new trial.

"Mr. Selinger: Now, I say this: I don't want to interject a remark -

"The Court: You can say something when I get through.

"Mr. Selinger: Yes, thank you.

"The Court: And I think this widow has just been done a very, very grave injustice, to have to go through these courts of law to collect this thousand dollars. I don't know how an insurance company can do it, treating their policy holders with unfairness. I say with unfairness to the widow almost goes to dishonesty as policyholders are being treated, if they are all being treated, if they are being treated as this policyholder is being treated.

"I am delighted to have an opportunity and to have a reason to enter a judgment notwithstanding the verdict. I would like to enter a judgment notwithstanding the verdict, even though this reason had not been presented. But there is an issue of fact, or was an issue of fact, and I don't think I could rightly have done so. Under these authorities presented here, I think I am perfectly justified in entering a judgment notwithstanding the verdict.

"If I am not mistaken, the law also provides that I am entitled to allow to the plaintiff attorney's fees for vexatious conduct on the part of the insurance company in making her go to courts of

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"If I am not mistaken, the law also provides that I am entitled to allow to the plaintiff attorney's fees for vexatious conduct on the part of the insurance company in making her go to courts of

law to collect that which she is entitled to. What is the amount of fees?

"Mr. Palmer: Well, I have it here, your Honor. I set it forth in the petition. The law says a minimum of \$250, and also interest; the same section provides for interest, and I am asking interest for two years at five per cent on a thousand dollars, or one hundred dollars; and the statute provides a minimum of \$250 attorney's fees and I am asking for that also, if the Court please.

"The Court: What is that?

"Mr. Palmer: It is in effect - a sworn petition, and counsel has the sworn copy. That would be \$1,350, if the Court would allow the motion of the petition for attorney's fees.

"The Court: The total amount is \$1,350.

"Mr. Palmer: The total is \$1,350.

"The Court: So there will be a judgment for plaintiff against the defendant in the sum of \$1,350 and costs. To which the defendant excepts. I take it he prays an appeal, and whatever other orders you want.

"Mr. Selinger: If the Court please -

"Mr. Palmer: If the Court please, if I might ask the Court at this time to sign the certificate, that if your Honor had not entered this now, non obstante veredicto, that you would have granted a new trial. That is in accordance with the Practice Act, that the Court signify its intention on that certification, and it is the practice.

"The Court: Yes.

"Mr. Palmer: So if your Honor in granting this motion would be kind enough to sign that certification for the record -

"Mr. Selinger: My motion, if the Court please, is to expunge the petition and affidavit which counsel filed, for attorneys' fees and for vexatious action, as the Court called it, and interest. May I have a ruling on that for the record?

"The Court: It is overruled.

"Mr. Selinger: My next motion is, or rather my other motion,

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and which the Court has not ruled on, was a motion to dismiss, based upon the decisions that I have read from the Second District, on the ground that there is not a triable issue before the Court. May I have a ruling on that?

"The Court: Overruled.

"Mr. Selinger: There was only one other thing that I wanted to call the Court's attention to. It perhaps is belated because the Court has indicated his decision. But it occurs to me that the summary that the Court has made for the trial record here is a summary in which it is very manifest to me that the Court is placing itself entirely into the position of the jury; and more than that, the Court is substituting itself for the jury and is trying the case here on questions of credibility of evidence and is trying the case upon the preponderance of evidence and is trying and is doing all of the things that ordinarily I understood a jury was entitled to dispose of.

"The Court is weighing the evidence, believing and disbelieving as it wishes and not only depriving the jury of the opportunity and of that right, but much more than that you are depriving the defendant who is entitled to all those things to be determined by a jury and not by a court. Especially is that so when the plaintiff in this case insisted that this was a lawsuit which he desired to be tried by a jury. I am at a loss to understand how the Court can weigh these things and feel so strongly about it, because it means we have here a conflict of evidence, and a conflict of evidence is one that you and I understand is one which we have a jury to determine. The Court has very strong feelings in this case and is permitting his feelings to, I think, go beyond what our rights are in this trial.

"The Court: It is too late for all this. You will have to tell that to the Appellate Court."

As this case may be tried again we desire to avoid as far as possible commenting upon the evidence, but we feel impelled to say that we are unable to understand the attitude of the trial court toward the defendant association, indeed, toward insurance companies generally.

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as it wishes and not only depriving the jury of the opportunity and of that right, but much more than that you are depriving the defendant who is entitled to all those things so as determined by a jury and not by a court. Especially is that so when the plaintiff in this case insisted that this was a lawsuit which he desired to be tried by a jury. I am at a loss to understand now the Court can weigh these things and feel so strongly about it, because it means we have here a conflict of evidence, and a conflict of evidence is one that you and I understand is one which we have a jury to determine. The Court has very strong feelings in this case and is permitting his feelings to, I think, go beyond what our rights are in this trial.

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As this case may be tried again we desire to avoid as far as possible commenting upon the evidence, but we feel impelled to say that we are unable to understand the attitude of the trial court toward the defendant association, indeed, toward insurance companies generally.

We find nothing in the record to justify the attack upon defendant association. Nor are we able to understand the severe attack made upon Dr. Szubczynski. True it is that the doctor stated on the witness stand that he first treated the deceased in August, 1937, but it also appears from his testimony that he had been ill for over a year and he testified that he might be wrong as to the year in which he treated the deceased. Nor was the court correct in his statement that the evidence of Dr. Szubczynski that the insured had sclerosis of the liver stood alone. Plaintiff introduced the medical certificate of death signed by Dr. Murphy, of the Edward Hines Jr. Hospital, and also a verified "physician's statement," signed by Dr. Hohner, connected with the Hines hospital. This last statement was attached to the proofs of death furnished defendant by plaintiff. Dr. Murphy and Dr. Hohner treated the deceased during the fourteen days that he was at the Hines hospital prior to his death. Both doctors stated that the deceased had had sclerosis of the liver for a year, that he had secondary anemia for six weeks, and cardiac enlargement for six weeks. Both stated that the immediate cause of death was uremia. Dr. Lescher, a witness for plaintiff, testified that in cases of sclerosis of the liver death can come either from a heart condition, kidney condition or a general complicated condition such as renal cardiac vascular condition.

As defendant made out a strong prima facie defense the action of the trial court in entering a judgment notwithstanding the verdict was absolutely unwarranted. The trial court stated several times that there was an issue of fact in the case and yet he finally concluded to enter a judgment notwithstanding the verdict.

In McNeill v. Harrison & Sons, Inc., 286 Ill. App. 120, 128, 129, the court said:

"The court in passing upon the motion must decide whether, as a matter of law, the party requesting the directed verdict is entitled thereto. This provision of the Civil Practice Act and rule 175 of the municipal court must be taken in connection with rule 22 of the rules

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As defendant made out a strong prima facie defense the action of the trial court in entering a judgment notwithstanding the verdict was absolutely unwarranted. The trial court stated several times that there was an issue of fact in this case and yet he still concluded to enter a judgment notwithstanding the verdict.

In Mohr v. Harrison & Sons, Inc., 286 Ill. App. 1st, 1937, 129, the court said:

"The court in passing upon the motion must decide whether, as a matter of law, the party requesting the directed verdict is entitled thereto. This provision of the Civil Practice Act and rule 17 of the municipal court must be taken in connection with rule 22 of the rules

of practice of the Supreme Court which provides: 'The power of the court to enter judgment notwithstanding the verdict may be exercised in all cases where, under the evidence in the case, it would have been the duty of the court to direct a verdict without submitting the case to the jury.' The statute and rules require the court to be governed by the same rules in passing upon a motion for a judgment notwithstanding the verdict as govern it in passing upon a motion for a directed verdict. The trial court in passing upon this motion has no more authority to weigh and determine controverted questions of fact under the Civil Practice Act than under the Practice Act of 1907. Illinois Tuberculosis Ass'n v. Springfield Marine Bank, 282 Ill. App. 14; Capelle v. Chicago & N. W. Ry. Co., 280 Ill. App. 471.

"If it were permissible for a trial judge on a motion non obstante veredicto to weigh the evidence and enter a judgment according to his opinion as to wherein lies the greater weight of the evidence, then the right to a trial by jury would be done away with and the judgment of the court substituted therefor. It is only where there is no evidence as a matter of law to sustain either a plaintiff's or a defendant's claim that a judgment may be rendered notwithstanding the verdict.

"In the instant case the evidence was conflicting and the court should not have substituted its judgment as to the weight of the evidence in place of the verdict of the jury."

In Capelle v. Chicago & N. W. Ry. Co., 280 Ill. App. 471, 480, the court said:

"We are not of the opinion that the present Practice Act in allowing a trial court to give judgment notwithstanding the verdict, in favor of a defendant, has in any way abrogated or modified the above rules of law. The trial court has no more power to weigh and determine controverted questions of fact under the present Practice Act, than it had prior thereto. In furtherance of the general principle that it is preferable that cases involving questions of

of practice of the Supreme Court which provides: "The power of the court to enter judgment notwithstanding the verdict may be exercised in all cases where, under the evidence in the case, it would have been the duty of the court to direct a verdict against the party admitting the case to the jury." The statute and rules regarding the court to be governed by the same rules in passing upon a motion for a judgment notwithstanding the verdict as govern it in passing upon a motion for a directed verdict. The trial court in passing upon this motion has no more authority to weigh and determine controverted questions of fact under the Civil Practice Act than under the Practice Act of 1907. Illinois Industrial Association v. Springfield Marine Bank, 284 Ill. App. 14; Capelee v. Chicago & N. W. Ry. Co., 230 Ill. App. 471. "If it were permissible for a trial judge on a motion non

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"In the instant case the evidence is conflicting and the court should not have substituted its judgment as to the weight of the evidence in place of the verdict of the jury."

In Capelee v. Chicago & N. W. Ry. Co., 230 Ill. App. 471, 480, the court said:

"We are not of the opinion that the present practice of allowing a trial court to give judgment notwithstanding the verdict in favor of a defendant, as in any way derogates or modifies the above rules of law. The trial court has no more power to weigh and determine controverted questions of fact under the present Practice Act, than it had prior thereto. In furtherance of the general principle that it is preferable that cases involving questions of

fact should be disposed of on their merits by a jury, rather than upon formal motions, a trial court after denying a motion for an instructed verdict for defendant, at the close of plaintiff's evidence and again at the close of all the evidence, should not render nugatory the verdict of a jury returned on disputed questions of fact, by rendering a judgment non obstante veredicto in favor of such defendant; but if the court is dissatisfied with the verdict under the evidence, he should grant a new trial instead."

In Valant v. Metropolitan Life Ins. Co., 302 Ill. App. 196, 204, the court said:

"Under the authorities above discussed, we are of opinion that under the evidence, the question of whether there had been an impersonation of Kazimer Valant by another was, in the first instance, a question for the jury, and therefore the court erred in entering judgment for plaintiff, notwithstanding the verdict. On such a motion, the court is not authorized to weigh the evidence. Boyda Dairy Co. v. Continental Casualty Co., 299 Ill. App. 469; White v. City of Belleville, 364 Ill. 577; McNeill v. Harrison & Sons, Inc., 286 Ill. App. 120. But if there is any evidence tending to support the defense, the case must go to the jury; and if the court is of opinion that the verdict of the jury is not sustained by a preponderance of the evidence, it is his duty, under the law, to set aside the verdict and award a new trial." (See, also, In re Estate of Lyons, 303 Ill. App. 642, 648.)

Accordingly, the judgment of the Circuit court of Cook county is reversed and the cause is remanded with directions to the trial court to pass upon plaintiff's motion for a new trial, and for further proceedings not inconsistent with this opinion.

We feel impelled to say that there is nothing in the record to justify the assumption of the trial court that the defense of the claim by defendant was vexatious and without

fact should be disposed of on their merits by a jury, rather than upon formal motions, a trial court after denying a motion for an instructed verdict for defendant, at the close of plaintiff's evidence and again at the close of all the evidence, should not render mandatory the verdict of a jury returned on disputed questions of fact, by rendering a judgment non obstante verdicto in favor of such defendant; but if the court is dissatisfied with the verdict under the evidence, he should grant a new trial instead."

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Estate of Evans, 203 Ill. App. 442, 443.)

Accordingly, the judgment of the Circuit Court of Cook County is reversed and the cause is remanded with directions to the trial court to pass upon plaintiff's motion for a new trial, and for further proceedings not inconsistent with this opinion.

We feel impelled to say that there is nothing in the record to justify the assumption of the trial court that the defense of the claim by defendant was vexatious and without

reasonable cause. As we view the record the officers of the defendant association would have been derelict in their duty to its members had they not defended the instant claim.

While the judge who tried the instant case should pass upon plaintiff's motion for a new trial, if possible, he should not, if the motion is granted, sit as the trial judge upon a retrial of the cause, in view of the fact that he manifested prejudice against the defendant in the instant trial.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS TO
THE TRIAL COURT TO PASS UPON
PLAINTIFF'S MOTION FOR A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.

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310 L.A. 389'

IN THE MATTER OF THE ESTATE OF
JOHN J. PREIB, Deceased.

MATHIAS W. PREIB,

Appellee,

v.

PETER J. PREIB, as Administrator
of the Estate of JOHN J. PREIB,
Deceased,

Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On June 22, 1938, Mathias W. Preib, petitioner, filed a petition in the Probate court of Cook county in which he prayed that Peter J. Preib, as administrator of the estate of John J. Preib, deceased, be directed to assign and transfer certain described certificates of stock to petitioner, which petitioner claimed the decedent had given to him as a gift. After a trial in the Probate court the judge of that court denied the prayer of the petition. Petitioner appealed to the Circuit court and in a trial de novo the trial judge entered an order finding that the certificates of stock were the sole and separate property of petitioner; that he became the owner of them on October 12, 1936, and that the administrator had no right, title or interest in the certificates. The administrator appeals.

The petition alleges, inter alia:

"2. * * * That during his life time the said John Preib was the owner of the following certificates of stock:

<u>Certificate No.</u>	<u>Number of shares</u>	<u>Corporation</u>
3847	1250	Ardsley Butte Corporation
D.F.22490	100	Continental Motors Corporation
D.F.22491	100	" " "
C.50917	100	Idaho Copper Co.
C.50918	100	" " "
C.50919	100	" " "
C.50920	100	" " "
C.50922	100	" " "
M. 1731	1000	Kay Copper Corporation
M. 1734	1000	" " "
N.Y.L.13739	80	Ohio Oil Co.

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MATHIAS W. PREIB,

Appellee,

v.

PETER J. PREIB, as Administrator
of the Estate of JOHN J. PREIB,
Deceased,
Appellant.

MRS. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

On June 22, 1936, Mathias W. Preib, petitioner, filed

a petition in the Probate Court of Cook County in which he prayed

that Peter J. Preib, as administrator of the estate of John J.

Preib, deceased, be directed to resign and transfer certain

described certificates of stock to petitioner, which petitioner

claimed the decedent had given to him as a gift. After a trial

in the Probate Court and judgment of that court ruled the prayer

of the petition. Petitioner appealed to the Circuit Court and

in a trial de novo the trial judge entered an order finding that

the certificates of stock were the sole and separate property of

petitioner; that he became the owner of them on October 12, 1936,

and that the administrator had no right, title or interest in

the certificates. The administrator appeals.

The petition alleges, inter alia:

"2. * * * That during his life time he said John Preib

was the owner of the following certificates of stock:

Certificate No.	Number of shares	Corporation
N.Y.I. 13739	80	Ohio Oil Co.
M. 1734	1000	" "
M. 1731	1000	Ray Corp. Corporation
C. 50922	100	" "
C. 50920	100	" "
C. 50919	100	" "
C. 50918	100	" "
C. 50917	100	" "
D.F. 22491	100	" "
D.F. 22490	100	" "
3847	100	United States Corporation

A.55907	100	Socony-Vacuum Corporation
A.55908	100	" " "
A.55909	100	" " "
L.37787	12	" " "
07085	74	The Studebaker Corporation
C.A. 1366	38	Yellow Truck & Coach Mfg. Co. (preferred 7% cumulative)

"3. * * * That on or about September 13, 1936, * * * John Preib endorsed said certificates of stock in blank before a witness with the expressed intention of making a gift of them to your Petitioner; and that after several discussions affirming his intention, * * * John Preib delivered the said certificates of stock as a gift to your Petitioner on October 12, 1936.

"4. That your Petitioner accepted the said gift and became then and there the owner of said certificates of stock; that he has ever since had possession and control of said certificates.

"* * * Petitioner prays that an order may be entered herein authorizing and directing Peter J. Preib, as Administrator of the estate of John Preib, deceased, to assign and transfer the said above described certificates of stock to your Petitioner * * *."

The administrator filed an answer denying that the deceased made a gift to petitioner of the certificates in question and averring that they belonged to the decedent at his death and now belong to his estate.

John J. Preib died on October 19, 1936. On April 21, 1938, petitioner filed a complaint in the Circuit court asking that he be declared the owner of the stocks in question. Thereupon Peter J. Preib, a brother of the intestate, caused administration proceedings to be commenced in the Probate court, and letters of administration were granted to him on May 13, 1938. Petitioner then dismissed the said complaint in the Circuit court and filed the instant petition in the Probate court, on June 22, 1938. The administrator and petitioner are brothers and heirs at law of the intestate, who also left him

100	100	A. 22007
100	100	A. 22008
100	100	A. 22009
100	100	A. 22010
100	100	A. 22011
100	100	A. 22012
100	100	A. 22013
100	100	A. 22014
100	100	A. 22015
100	100	A. 22016
100	100	A. 22017
100	100	A. 22018
100	100	A. 22019
100	100	A. 22020
100	100	A. 22021
100	100	A. 22022
100	100	A. 22023
100	100	A. 22024
100	100	A. 22025
100	100	A. 22026
100	100	A. 22027
100	100	A. 22028
100	100	A. 22029
100	100	A. 22030
100	100	A. 22031
100	100	A. 22032
100	100	A. 22033
100	100	A. 22034
100	100	A. 22035
100	100	A. 22036
100	100	A. 22037
100	100	A. 22038
100	100	A. 22039
100	100	A. 22040
100	100	A. 22041
100	100	A. 22042
100	100	A. 22043
100	100	A. 22044
100	100	A. 22045
100	100	A. 22046
100	100	A. 22047
100	100	A. 22048
100	100	A. 22049
100	100	A. 22050
100	100	A. 22051
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100	100	A. 22088
100	100	A. 22089
100	100	A. 22090
100	100	A. 22091
100	100	A. 22092
100	100	A. 22093
100	100	A. 22094
100	100	A. 22095
100	100	A. 22096
100	100	A. 22097
100	100	A. 22098
100	100	A. 22099
100	100	A. 22100

"3. * * * That on or about September 12, 1935, * * *
John Klein endorsed a bill of exchange for \$100,000 in favor of
witness with the expressed intention of making it a bill of exchange for
your Petitioner; and that after receipt of the bill of exchange the
intention, * * * John Klein delivered the bill of exchange to
stock as a gift to your Petitioner on October 12, 1935.

"4. That your Petitioner received the bill of exchange and
became then and there the owner of said bill of exchange of stock;
that he has ever since had possession and control of the same;
cases.

"* * * Petitioner says that on and after the date
herein authorizing and directing Peter A. Klein, an administrator
of the estate of John Klein, deceased, to sell the same or
said above described real estate of stock as to said estate * * *
The administrator filed an answer with the court and there
made a gift to petitioner of the same and thereupon the same
that they belonged to him and he is now entitled to the same
cases.

John A. Klein died on October 12, 1935, on July 22, 1935,
petitioner filed a bill of exchange for \$100,000 in favor of
Klein the owner of the same and thereupon the same was
a brother of the intestate, and said bill of exchange was
commenced in the Probate Court, and thereupon the same was
granted to him on July 1, 1935, and thereupon the same was
complaint in the Circuit Court of the United States in the
Probate Court, on June 12, 1935, the administrator and petitioner
are brothers and heirs at law of the intestate, who also have him

surviving as heirs at law his brother Michael, since deceased, and a number of nephews and nieces. The intestate was a bachelor and lived in the same house with petitioner. The latter's family consisted of his wife, his daughter Helen, his son Michael and the latter's wife, Ruth.

The administrator, appellant, strenuously argues that the claim of petitioner to the stock is a dishonest one, and that the finding of the court is not justified under the evidence nor the law governing an alleged gift inter vivos. After a careful consideration of the evidence we are satisfied that this contention is a meritorious one.

Helen Preib was a witness in behalf of petitioner. She testified that petitioner's family and her uncle, the intestate, lived together; that the intestate died on October 19, 1936; that on September 13, 1936, she had a conversation with him in the kitchen of the home; that while he was seated at the kitchen table he asked for pen and ink and she got them and he signed his name on the backs of the stock certificates; that he said he was giving them to her dad, and that they were to be his own property for himself; that while the intestate was signing the certificates she was sitting right next to him at the table and had an opportunity to see both sides of the stocks; that her uncle had no objection to her examining any of the certificates; that she was just sitting there and watching him sign them; that after her uncle finished signing the certificates he folded them and there was a piece of newspaper lying on the table and he wrapped the certificates in the newspaper and tied a piece of string around the package, which was about nine by four, and about an inch thick; that the stocks were folded three times; that he then took the package to his bedroom; that he signed his name in the middle of the back of the certificates; that there were seventeen certificates in all. The following then occurred: "Q. Do you remember the names of any of these certificates? A. Yes, I do. Q. What were they? A. Socony Vacuum, Continental Motors,

the latter's wife, Ruth, consisted of his wife, the daughter of , his son Richard and and lived in the same home with petitioner. The latter's family and a number of nephews and nieces. The latter was a petitioner surviving as heirs to the late brother John F. Jones deceased.

as a meritorious one. The Administrator, appellant, has already argued that the claim of petitioner to the stock is a fraudulent one, and that the finding of the court is not justified under the evidence nor the law governing an alleged fraudulent transfer. After a careful consideration of the evidence we are satisfied that this contention is a meritorious one.

[illegible]

Studebaker, Yellow Truck and Coach, Ohio Oil, Idaho Copper, Kay Copper, and Ardsley Butte. Q. Now, were there any other stocks that he signed at that time, that you can remember? A. No, none that I can remember. Q. Was there any certificate for Continental Motors? A. Yes, there was. Q. Did you ever see your uncle sign any other stocks after that time? A. No, I didn't." After the witness was shown certificate No. NY-A55907, for 100 shares in the Socony Vacuum Corporation, issued in the name of the intestate, the following occurred: "Mr. O'Hara [counsel for appellee]: I am asking whether that is one of the certificates she saw her uncle sign. * * * The Witness: Yes, this is one of the certificates. * * * This certificate bears my signature. I signed this stock certificate as a witness on October 12, 1936." After she was shown certificate number NY-A55908, for 100 shares of Socony-Vacuum Corporation stock, she was asked if that was one of the certificates of stock that the intestate signed in her presence on September 13, 1936. "The Witness: Yes, this is one of the certificates. I actually witnessed my uncle sign this on September 13, 1936. I put my signature on this certificate of stock as a witness on October 12, 1936." Shown a certificate for 100 shares of stock in the Socony-Vacuum Corporation bearing number NY-A55909, issued to the intestate, she was asked if she saw the intestate sign that certificate on September 13, 1936, to which she answered: "This is one of the certificates that he signed. My uncle signed these stocks September 13, 1936. I signed my name as a witness thereto October 12, 1936." Shown a certificate for 12 shares of stock in the Socony-Vacuum Corporation bearing number NY-L37787, issued to the intestate she was asked if that was one of the certificates signed by the intestate in her presence on September 13, 1936, to which the witness answered, "The certificate bears my signature. I signed my name to this certificate on October 12, 1936." The witness then repeated that she signed the certificate on October 12, 1936. Shown a certificate for 100 shares of the common stock of Continental

Stademaker, Yellow Truck and Coach, Ohio City, Idaho Copper, May
Copper, and Ardsley Butte. Q. Now, were there any other stocks
that he signed at that time, that you can remember? A. No, none
that I can remember. Q. Was there any certificate for Continental
Motor? A. Yes, there was. Q. Did you ever see your uncle sign
any other stocks after that time? A. No, I didn't. After the
witness was shown certificate No. NY-45503, for 100 shares in the
Bocony Vacuum Corporation, issued in the name of the intestate, the
following occurred: "Mr. O'Hara [unclear] for appellant: I am
asking whether that is one of the certificates she saw her uncle
sign. * * * The witness: Yes, that is one of the certificates.
* * * This certificate bears my signature. I signed this stock
certificate as a witness on October 12, 1936." After she was shown
certificate number NY-45503, for 100 shares of Bocony-Vacuum Cor-
poration stock, she was asked if that was one of the certificates
of stock that the intestate signed in her presence on September 12,
1936. "The witness: Yes, this is one of the certificates. I
actually witnessed my uncle sign this on September 12, 1936. I
put my signature on this certificate of stock as a witness on
October 12, 1936." Shown a certificate for 100 shares of stock
in the Bocony-Vacuum Corporation bearing number NY-45503, issued
to the intestate, she was asked if she saw the intestate sign that
certificate on September 12, 1936, or when she answered: "This is
one of the certificates that he signed. He never signed these stocks
September 12, 1936. I signed my name as a witness on October 12,
1936." Shown a certificate for 100 shares of stock in the Bocony-
Vacuum Corporation bearing number NY-45503, issued to the intestate
she was asked if that was one of the certificates signed by the
intestate in her presence on September 12, 1936, to which the witness
answered, "The certificate bears my signature. I signed my name to
this certificate on October 12, 1936." The witness then repeated
that she signed the certificate on October 12, 1936. Shown a
certificate for 100 shares of the common stock of Continental

Motors Corporation, bearing number DF 22490, issued to the intestate, she was asked whether that was one of the certificates signed by the intestate in her presence on September 13, 1936, to which she answered, "The Witness: The certificate bears my signature. I signed my name to this certificate on October 12, 1936." Shown a certificate for 100 shares of the common stock of Continental Motors Corporation, bearing number DF 22491, she was asked if that was one of the certificates of stock that was signed by the intestate in her presence on September 13, 1936, to which she answered: "Yes, it is one of the certificates. It bears my signature." The witness further testified that the intestate, on September 13, 1936, signed, in her presence, certificates No. NYL 13739, No. CA 1366, No. 07085, No. 3847, No. M 1731, No. M 1734, No. C 50917 B, No. C 50918 B, No. C 50919 B, No. C 50920 B, and No. C 50922 B. The following then occurred: "Mr. O'Hara: Q. Miss Preib, on Petitioner's Exhibits 1 to 9 you have testified that you signed these certificates of stock. Now, will you state who was present when you signed these exhibits 1 to 9? * * * The Witness: A. Mr. Collins, my attorney, and myself. * * * Mr. O'Hara: Q. And when were these exhibits 1 to 9 signed? The Witness: A. In February, 1937. Mr. Black [counsel for appellant]: February, 1937? The Witness: Yes. Mr. Black: I thought she said October 12th before. Mr. O'Hara: Yes, she did, but she was mistaken. I just wanted to clear that up." The witness further testified that while her uncle was signing the "stocks" her mother came into the kitchen, got a drink of water and went out; that she, the witness, was present in the home on October 12, 1936, at about 7:30 p.m.; that her brother Michael, her dad, her Uncle John and herself were present at that time; that they were all sitting in the dining room and her uncle, the intestate, got up from the table, went to his room, and brought out a package wrapped in newspaper and handed it to her dad and told him that they were his, that he said, "These are yours, Matt;" that her dad asked

were his, that he said, "There are yours, Mary;" that he had asked wrapped in newspaper and handed it to her dad and told him that they got up from the table, went to his room, and brought out a package. they were all sitting in the dining room and her uncle, the intestate, her dad, her Uncle John and herself were present at that time; that October 12, 1936, at about 7:30 p.m.; that her brother Michael, and went out; that she, the witness, was present in the home on the "stools" her mother came into the kitchen, got a drink of water up." The witness further testified that while her uncle was signing Yes, she did, but she was mistaken. I just wanted to clear that Mr. Black: I thought she said October 12th before. Mr. O'Hara: [counsel for appellant]: Forrery, 1937; The witness: Yes, to a signed? The witness: A. In February, 1937. Mr. Black and myself. * * * Mr. O'Hara: A. When were these exhibits 1 exhibits 1 to 9? * * * The witness: A. Mr. Collins, my attorney, of stock. Now, will you state who was present when you signed these Exhibits 1 to 9 you have testified that you signed these certificates then occurred: "Mr. O'Hara: A. What first, on Postmaster's No. C 50919 B, No. C 50920 B, and No. C 50922 B. The following No. 3847, No. M 1731, No. M 1734, No. C 50917 B, No. C 50918 B, in her presence, certificates No. M 1735, No. C 1360, No. O 7082, further testified that the intestate, on September 13, 1936, signed, it is one of the certificates. It bears my signature." The witness in her presence on September 13, 1936, to which she answered: "Yes, was one of the certificates of stock that was signed by the intestate Motors Corporation, bearing number D 22491, and was asked if that a certificate for 100 shares of the common stock of Continental I signed my name to this certificate on September 13, 1936." known she answered, "The witness: The certificate bears my signature, by the intestate in her presence on September 13, 1936, to which she answered, "Yes, she was asked whether that was one of the certificates signed state, she was asked whether that was one of the certificates signed to the intestate, bearing number D 22490, issued to the intestate-

him what they were and he said "stocks;" that her dad said, "Well, what will I do with them?" and her uncle said, "They are yours. You can do whatever you please with them;" that her dad said, "I will sell them," and the intestate said, "That is up to you, they are yours, but I would advise you to keep three of them;" that nothing else was said or done at that time. The following then occurred:

"The Court: Describe the package that you saw him bring out. The

Witness: A. It was wrapped in newspaper, and there was a string tied around it, and it was about nine inches long and four inches wide and about an inch thick. Mr. O'Hara: Well, what happened

to this package of stocks after that, if anything? * * * The

Witness: A. He handed it to my dad and my dad took it and put

it in his room. Q. Did you see the package after that? A. Yes,

I did. Q. And when and where did you see this package after that?

A. In my home when Mr. Collins brought them over for me to sign."

Upon cross-examination the witness testified that they all lived on the first floor of a two-story building; that they had six rooms and the intestate occupied one of them and kept his personal effects and belongings in his room; "Q. Who made his bed and cleaned up

his room? A. My mother and I both did. Q. And you had access to

this room? A. Yes. Q. Did your father ever go into this room?

A. No, he didn't;" that on September 13, 1936, the pen and ink

that she got for her uncle was in the pantry on the shelf; that the pantry adjoins the kitchen and the intestate could have gotten the pen and ink himself, as he knew where they were; that she was in

the parlor when the intestate called her and asked her if she would get the pen and ink for him; that when she reached the kitchen she

saw that her uncle was sitting at the table and he had the stock certificates before him; that after she gave him the pen and ink she sat down at the table with him, right next to him on his left

hand side; that when he finished signing the instruments she read

them; "Q. You read them one by one? A. Yes, I looked at them.

Q. Well, did you read them, or did you just merely look at them?

A. I looked at the names of the stocks. Q. You didn't read the

stocks? A. I didn't read the whole thing, no, but I read the names. I knew what they were;" that when the intestate signed the certificates they were lying face down on the table; that her mother was present at the time he was signing the certificates; that she came in for a drink and then went out; that she, the witness, did not know where in his bedroom he kept his personal belongings, papers and things; that the first time she saw the certificates was when they were on the kitchen table. The witness then stated that she had testified at the previous trial of the cause in the Probate court of Cook county. The witness was then asked if, in the Probate court proceedings, she was asked the following question: "Did you examine them when he showed them to you?" And your answer was, 'No, I didn't?'" After counsel for the petitioner had made strenuous objections to the question the court ruled that she might answer. "The Witness: A. I don't remember if that is what I said, or not." The following then occurred: "Mr. Black: Q. Were you asked this question in the Probate Court, 'Well, how did you know they were stocks?' Was this your answer, 'Because he told me,?'" The Witness: A. Yes, I did. Q. Did he tell you the kind of stock they were? * * * The Witness: A. No, he didn't tell me what kind they were. Mr. Black: Q. You didn't read the stocks, did you? The Witness: Yes, I did. Mr. Black: Were you asked this question, and was this your answer, in the Probate Court: 'You didn't read the stocks?' And your answer was, 'No, I didn't.'" The Witness: I don't remember if that is the way I answered it or not. Mr. Black: Were you asked this question during your testimony in the Probate Court of Cook County: 'You testified before that you didn't know the kind of stock that John Preib was endorsing. Did you, or didn't you?' And the answer was, 'I did.' Was this question put to you, and did you give this answer? * * * The Witness: I don't remember saying anything like that. Mr. Black: Was this question put to you during your testimony in the Probate Court: 'You didn't

stocks? A. I didn't read the whole thing, no, but I read the names. I knew what they were; that when the interest signed the certificates they were lying down on the table; that her mother was present at the time he was signing the certificates; that she came in for a drink and then went out; that she, the witness, did not know where in the bedroom he kept his personal belongings, papers and things; that the first time she saw the certificates was when they were on my kitchen table. The witness then stated that she had recalled at the previous trial of the cause in the Probate court of Cook county. The witness was then asked if, in the Probate court proceedings, she had asked the following question: "And you examine them when he showed them to you? And your answer was, 'no, I didn't'." The counsel for the petitioner had no strenuous objections to the question the court ruled that she might answer. The witness: A. I don't remember if that is what I said, or not." The following then occurred: "Mr. Black: Q. Now you asked this question in the Probate Court, 'Well, how did you find they were taken out of this your answer, 'because he told me.' The witness: A. Yes, I did. Q. Did he tell you the kind of book they were?" The witness: A. No, he didn't tell me the kind they were. Mr. Black: Q. You didn't read the book, did you? The witness: Yes, I did. Mr. Black: Q. Now you asked this question, and the witness answered, in the Probate Court, 'because he told me.' And your answer was, 'no, I didn't.' The witness: I don't remember if that is the way I answered it or not. Q. All right. Were you asked this question in the Probate Court of Cook county: 'Now the bill of exchange, and the kind of book that John Smith was carrying, and the kind of book that didn't you?' And the answer was, 'I didn't.' The witness: I don't remember saying anything like that. Mr. Black: Q. This question put to you during your testimony in the Probate Court, 'And you didn't you?' And the answer was, 'I didn't.' The witness: I don't

read the certificates?' And the answer, 'No, I didn't.' Now,
was that question put to you and did you make that answer? The
Witness: I couldn't say whether I did or not. Q. Was this
question put to you in the Probate Court: 'Mr. Black: You
didn't read the certificates?' And the answer, 'No, I didn't.'

The Witness: I don't remember if that is the way I answered it or not. [For a better understanding of the evidence we will state at this time that when respondent was putting in his evidence it was stipulated that if the stenographer who took the evidence of Helen Preib at the time she testified in the Probate court proceedings were called as a witness in the instant proceedings she would testify that the foregoing impeaching questions (*italicized*) were put to Helen Preib in the Probate court proceedings and that she made the foregoing answers (*italicized*) to the same.] Question, 'You didn't know what company they were, or what they represent, or what?' And your answer, 'I knew he had stocks in those companies.' Was that question put to you, and did you make that answer? * * *

The Court: Do you remember, in the Probate Court the question the attorney just read, and making the answer he just read? Do you remember that? The Witness: No, I don't." The witness then testified that the size of the package that she saw the intestate hand her father was nine by four by one inch; that she never measured the package. The witness, after admitting that she had made a mistake as to the date on which she signed the certificates, then testified that she placed her signature upon nine of the certificates at the request of her attorney, Mr. Collins, in February, 1937, at her home, when he delivered the stocks to her in a package; that the package was about nine inches long and four inches thick, and about an inch wide - "four inches wide and about an inch thick;" that there were seventeen certificates in the package that he delivered to her but that she only put her name on nine of them; "Q. Which ones? Will you name them? A. There is Socony Vacuum,

read the certificate? And the answer, 'No, I didn't.' Now,

was that question put to you and did you make that answer? The

Witness: I couldn't say whether I did or not. It was this

question put to you in the private court: 'Mr. Jones: You

didn't read the certificate?' And the answer, 'No, I didn't.'

The witness: I don't remember it that is the way I answered it

or not. [For a better understanding of the evidence will

state at this time that when respondent was putting in his evidence

it was stipulated that if the stenographer who took the evidence of

Helen Freib at the time she testified in the private court proceed-

ings were called as a witness in the instant proceedings she would

testify that the foregoing happened in the instant proceedings and that she

put to Helen Freib in the private court proceedings and that she

made the foregoing answers (dictated) to the same. [Question,

'You didn't know that company they were, or what they represent,

or what?' And your answer, 'I know nothing about it, I don't know

was that question put to you, and if you will that answer? * *

The Court: Do you remember, in the private court the question the

attorney just read, and making the answer in that order to you

remember that? The witness: No, I don't. The witness then testi-

fied that the size of the package was about the size of the state hand

her father was told by one of the boys that she had measured

the package. The witness, after making that answer and made a

mistake as to the date on which the letter was dictated, then

testified that she placed the letter upon one of the certificates

at the request of Mr. Jones, Mr. Collins, Mr. Jones, 1917,

at her home, when he delivered the letter to her in a package; that

the package was about the size of the state hand, and

about an inch wide - "I don't know what it is about an inch wide"

that there were seven certificates in it and that he deliv-

ered to her but that she only put her name on one of them."

Which one? Will you name that? A. There is George Jackson,

Continental Motors, Studebaker, Yellow Truck & Coach, Ohio Oil; that is all I can remember now;" that after she signed the certificates she never saw them again until at the trial in the Probate court.

Petitioner testified that after the death of the intestate he had in his possession the certificates of stock that are set up in his petition; that he put them away in his bedroom and he received dividends on the stocks, which he put in the bank. The witness was further allowed to testify, over the objection of counsel for the respondent, that the intestate gave to his brother Michael J. Preib "one thousand dollars in currency in an envelope, and also a note" for one hundred dollars; that the note and the thousand dollars "was just put in an envelope, and outside the envelope it was marked, 'From John to Mike.'" The following then transpired: "Q. Will you state who was present, and the circumstances, when you opened that envelope? * * * [Objections of counsel for respondent overruled.] The Court: He may answer. * * * The Witness: My son, Michael, my daughter, myself, and my son's wife; and my wife was in the back in the kitchen, she wasn't present at that time. * * * Q. Mr. Preib, what did you do with this envelope and its contents after your brother died? The Witness: Well, I put it away. ~~That witness xxxxxxxxxx, xxxxxxxxxxxxxx~~ Q. After your brother died? A. I put it away. Oh, after my brother died I gave it to Michael, Michael J. Preib, the brother, the youngest. Q. Did you give him the note that was contained in it? A. I gave him the envelope the same as it was given to me by the deceased." Upon cross-examination the witness testified that he was told by his counsel that a suit had been filed for him in the Circuit court; that he did not see nor read the pleadings.

Michael J. Preib, son of petitioner, testified that he was present at home on October 12, 1936, about 6:30 p.m.; that petitioner, Helen, the witness's wife, Ruth, and witness's mother

were present; also the intestate; that the intestate got up from the table and went to his bedroom and brought out a package, that was in the bedroom, with a piece of string on it, and looked at his dad and sat down; that when he sat down he was right alongside of witness's dad and the intestate said, "Mat, here is the stocks. I want you to have them. I am giving them to you. Don't give them to anybody else;" that the intestate also gave witness's father the envelope with the promissory note in it and a \$1,000 bill; that the envelope was opened and sealed afterward, "but it was open at the time, and I saw it;" that it contained a \$1,000 note and a promissory note for \$100; that on the outside of the envelope was written, "From John to Mike." "I inspected the envelope;" that witness's dad "had it and opened it up and pulled it out, and John told him to look at it;" that intestate said to petitioner: "These are yours, you can do what you want with them, but I advise you not to sell because there are two or three that are valuable;" that he also told him to give the other envelope to "my uncle Mike;" "But as far as the rest of them, they are not entitled to anything," and "They never did anything for me;" that the package was about nine inches long, four inches wide, and probably about an inch thick; that petitioner put the package in a dresser drawer in his bedroom and locked the drawer; that he saw the package opened in Mr. Collins' office in February, 1937; that the seventeen certificates bear the signature of the intestate; that he did not see what was in the package at the time it was given to petitioner.

Ruth Preib, wife of Michael J. Preib, testified that she was at the home on October 12, 1936; that there were also present petitioner, Michael J. Preib, Helen Preib, John J. Preib, and Mrs. Mathias Preib; that John J. Preib handed a package to petitioner and said, "I give these you Mathias. They are yours to do with whatever you wish to do with," and intestate also handed him an envelope to give to Michael J. Preib; that she did not hear any

were present; also the witnesses; and the day after that the table and went to his bedroom and brought out a package, that was in the bedroom, with a piece of string on it, and looked at his dad and set down; and when he set down it was a right alongside of witness's dad and the intestate said, "But, here in the books, I want you to have them. I am giving them to you. Don't give them to anybody else;" and the intestate said, "I don't give witness's father the envelope with the promissory note in it and a \$1,000 bill; that the envelope was opened and sealed afterwards," but it was open at the time, and I saw it;" that it contained a \$1,000 note and a promissory note for \$100; that on the outside of the envelope was written, "From John to Mike." "I inspected the envelope;" and witness's dad "had it and opened it up and pulled it out, and John told him to look at it;" that intestate said to petitioner: "These are yours, you can do what you want with them, but I advise you not to sell because there are two or three that are valuable;" and witness told him to give the other envelope to "my little Mike;" and as far as the rest of them, they are not entitled to anything, and "they never did anything for me;" that the package was about nine inches long, four inches wide, and probably about a half inch thick; and petitioner said the package in a dresser drawer in his bedroom and took it into the drawer; that he saw the package opened in the following office in February, 1937; that the advertisement in the paper was the signature of the intestate; that he did not see him at the time it was given to petitioner.

And Fred, wife of Michael J. Fred, who lived with the intestate at the home on October 12, 1937; and witness said that petitioner, Michael J. Fred, who lived with the intestate and wife, Katherine Fred; that John J. Fred had a package to petitioner and said, "I give these you Michael. My father told me to give whatever you wish to do with." and intestate said witness said the envelope to give to Michael J. Fred; that he did not see any

further conversation at that time. On cross-examination the witness testified that she was standing in the adjoining room at the door at the time of the talk; that she was in the kitchen at the time; that she was standing in front of the door and they were just inside of the door; that she never saw the contents of the bundle; that Michael Prieb died after the intestate died. This concluded the testimony for petitioner.

On behalf of respondent Mary A. Newcombe testified (by deposition) that she lives at 7439 Langley avenue; that her deposition is being taken in her apartment because she is not able to leave the same; that she had not been out of her apartment for two years; that she is very nervous and not very well and is not able to travel downtown; that she would be glad to go to the court if she were able to do so; that she is a housewife and lives with her family, consisting of her husband, her sister-in-law, her son and herself; that the intestate, petitioner and she are cousins; that on the night of the wake of the intestate she had a conversation with petitioner at the undertakers', located in the bank building at 55th and Halsted streets; that she and petitioner were alone during the conversation, which took place around six o'clock p.m.; that petitioner was talking about John's illness and told her that John had been sick with diabetes for some time and that he, petitioner, "tried awfully hard to get John to make a will to him but he wouldn't do it;" that petitioner said, "From time to time I tried, but it was so use. We even had words over it. I tried to make him see that the rest of the family would come in if he didn't make a will;" that petitioner said, "John would get sulky and angry and go down to the basement;" that petitioner said the intestate had a room fixed up for himself in the basement, where he took his instrument; that he would go down in the basement and sometimes stay for the day; that "the only one that could do anything with him was my wife. She would go down and get him to come up from the basement;" that petitioner further said, "I was going to try and urge him to make that will out but his death came too

sudden. He died so suddenly;" that she said to petitioner, "Well, that is too bad. That is going to mean a lot of trouble;" that petitioner said, "I know it is, a lot of Court trouble. He could have avoided that for me; * * * You know we had a vault. We both kept our valuables in there; both John and I had our valuables in there;" that the witness then said, "Well, you know what that will mean. It is only going to mean you won't be able to get into the vault until it is probated in Court;" that petitioner answered, "I took care of that. About a month ago I went down and I cleaned it up. I got mine;" that petitioner further said, "Now it goes to Court, and before I let the others get it I will let the Court eat it up." The following then occurred: "Q. Did he say anything about John knowing he went to the vault? A. I asked him, 'Did John know that?' He said, 'Oh, no, John don't know that, because John never goes down to the vault anyway. I took care of his business for him.' Q. Did Mathias say anything to you as to what he told John if no will was made out? A. Well, he said the others would come in on it, but even that didn't make any difference with John. Q. When would they come in on it? A. Well, after his death. Q. If he didn't make a will, or if he did make a will. A. If he didn't make out a will. He said, 'He could have made it out to my wife, - she was always good to him, - or even to the children, but he wouldn't do it. He must have thought I had enough of my own.' So that was what he said. He spoke about taking the stuff out of the box, he said, 'They will have a hard time finding out what I took out of the box.' And if I remember right, he said he transferred the rest of the stuff to another vault." The witness further testified that she was not an heir at law of the intestate and had absolutely no interest in the matter whatsoever; that she did not prefer one cousin to another. Upon cross-examination the witness was questioned as to her physical condition. She also testified that because of ill effects she felt after going to the wake she

sudden. He died so suddenly; "What she said to a physician,
"Well, that is too bad. That is going to mean a lot of trouble;"
that physician said, "I'm sorry it is, a lot of trouble, but
could have avoided that for me; * * * You know we had a variety. We
both kept our valuables in there; both John and I had our valuables
in there;" that she said, "Well, you know that that
will mean. It is only John to mean you said it. It is not
the fault until it is proved it is yours;" that physician answered,
"I took care of that. I don't want you to go down and I cleaned
it up. I got mine;" that physician answered, "Now it goes to
Court, and before I let the others see it I will let the Court see
it up." The following then occurred: "Q. Did he say anything
about John moving it out to the vault? I asked him, 'Did
John know that?' He said, 'Oh, no, John doesn't know that, because
John never goes down to the vault anyway. I took care of his
business for him.' Q. Did he say anything to you as to
what he told John it would be? He said, 'Well, he said that
others would come in on it, but very few would have any difficulties
with John. Q. When would it be there in on it? He said, 'After his
death. Q. If he died, what would be the difference? He said, 'If
he didn't take out the vault, he wouldn't have made it out
to my wife - she would always have to him - and to the children,
but no wouldn't do it. Q. And I have thought I had enough of my
own. Q. That was all, was it? He said, 'I don't think that would
out of the box, he said, 'That will be very hard on the children and
I took out of the box. Q. And I don't think, he said he thought
turned the rest of the vault to another vault. The witness further
testified that he had no knowledge of the vault and had
absolutely no interest in the vault. He said he was not
present and certain to another. Q. And he was not present
was questioned as to her physical condition. She also testified
that because of ill effects she felt after John to the wife she

was not able to go to the cemetery, but that she did go to the church; that she and petitioner were alone at the time of the conversation; that prior to the conversation her husband and Michael went out for a walk, and that when they returned petitioner said to her, "Here comes Mike, I won't say no more." In rebuttal petitioner testified that he had a talk with Mrs. Newcombe at the wake but that "it was a general conversation;" that there were about forty or fifty people in the room at the time; that he did not talk to Mrs. Newcombe "without anybody else being in the room;" that he just said hello to her and asked her how she was getting along and how she was feeling, and thanked her for coming; that he did not talk with her about a will, nor about having a joint vault with the intestate.

The law as to what constitutes a gift inter vivos of a chose in action is well settled. "The burden of proof of a gift is on the donee to prove all facts essential to a valid gift. The essential facts are the delivery of property by the donor to the donee with intent to pass the title, and the great weight of authority is that the proof to sustain the gift must be clear and convincing. (Maxler v. Hawk, 233 Pa. St. 316; In re Bolin, 136 N.Y. 177; Grey v. Grey, 47 id. 552; Chambers v. McCreery, 106 Fed. 364; 45 C. C. A. 322.) Mere possession by one claiming property as a gift, after death of the owner, is universally, we believe, held insufficient to prove a valid gift." (Rothwell v. Taylor, 303 Ill. 226, 230, 231.) The Rothwell case is also authority for the proposition that where the donor and donee live together (p. 232) "Mere proof of delivery may be some evidence tending to show intent, but under the circumstances shown in this case all the authorities are that but little consideration can be given to it." In some of the states it is provided by statute that if the donor and donee reside together at the time of the gift, possession by the donee at their place of common residence is not a sufficient possession

was not able to go to the cemetery, but that on the day of the funeral; that she and petitioner were alone at the time of the conversation; that prior to the conversation petitioner was not with Michael went out for a walk, and that when petitioner returned Michael said to her, "Here comes Mike, I won't say no to him." Petitioner testified that he had a talk with Michael, and that he was awake but that "it was a general conversation about the estate and about forty or fifty people in the room at the time; that he did not talk to Mrs. Newcombe" without anybody else being in the room; that he just said hello to her and asked her how she was getting along and how she was feeling, and then he went out; that he did not talk with her about a will, nor about leaving a joint vault with the intestate.

The law as to what constitutes a gift is well settled. The donor must have the intent to give, and the donee must accept the gift. The essential facts are the delivery of property to the donee with intent to pass the title, and the donee's right of authority is that the proof to establish the gift must be clear and convincing. (*Maxley v. Hawk*, 233 Pa. 441, 136 Pa. 136; *Grey v. Grey*, 47 Pa. 52; *Maxley v. Hawk*, 136 Pa. 136; 47 Pa. 52; *Maxley v. Hawk*, 136 Pa. 136; 47 Pa. 52.) Where possession by one claiming property as a gift, after death of the owner, is disavowed, we believe, held insufficient to prove a valid gift. (*Maxley v. Hawk*, 136 Pa. 136; 47 Pa. 52; *Maxley v. Hawk*, 136 Pa. 136; 47 Pa. 52.) The *Robinson* case is also authority for the proposition that where the donor and donee live together, "where proof of delivery may be some evidence tending to show intent, but under the circumstances shown in this case the law authorities are that but little consideration can be given to it." In some of the states it is provided by statute that in the event the donor and donee reside together at the time of the gift, possession by the donee at their place of common residence is not a satisfied possession

within the meaning of the statute. (See 28 C. J. p. 638.) An example is section 2414 of the Code of Virginia, which reads as follows: "No gift of any goods or chattels shall be valid, unless by deed or will, or unless actual possession shall have come to and remained with the donee, or some person claiming under him. If the donor and donee reside together at the time of the gift, possession at the place of their residence shall not be a sufficient possession within the meaning of this section."

There are many facts and circumstances in this case that tend to show that petitioner's claim is not an honest one. A question naturally arises as to why the intestate should have given away his entire estate on the evening of October 12, 1936, leaving himself penniless. There is nothing in the proof to show that he was seriously ill at the time, and the only evidence as to the manner of his death is the testimony of Mrs. Newcombe that petitioner told her that he was trying to get the intestate to make a will, "but his death came too sudden. He died so suddenly." If the intestate was in possession of his mental faculties - and petitioner, in order to maintain his claim, is obliged to assert that he was - it would seem natural that the intestate, in order to insure his own support, would have retained the stocks during his lifetime and disposed of them by will. Petitioner intimates that the proof does not show that the intestate disposed of all of his property on October 12, but petitioner's claim is based upon the theory that he was closer to the intestate than anybody else and that the intestate trusted him in the matter of his affairs. Mrs. Newcombe testified that petitioner told her that he "took care of the business" of the intestate. If the intestate left other property why did not petitioner commence probate proceedings after the death of the intestate? It was only after petitioner's ^{complaint} ~~will~~ disclosed that he had in his possession the certificates of stock in question that Peter J. Preib commenced the Probate court proceedings, ~~on June 22, 1938~~ Petitioner also stresses the evidence of several of the witnesses

within the meaning of the statute. (See 28 U. S. C. 638.) An example is section 2414 of the Code of Virginia, which reads as follows: "No gift of any goods or chattels shall be valid, unless by deed or will, or unless actual possession shall have come to and remained with the donee, or some person claiming under him. If the donor and donee reside together at the time of the gift, possession at the place of their residence shall not be a sufficient possession within the meaning of this section."

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that the intestate left a thousand dollars and a promissory note to Michael, his brother. It is significant that Helen, who testified that she had stated all that occurred on the evening of October 12, did not mention the important fact - if it be a fact - that the intestate made a gift to his brother Michael. Michael was deceased at the time of the hearings, and in view of the character of the instant claim the testimony as to the alleged gift to Michael may well be questioned. Petitioner places great stress upon his testimony that he had possession of the certificates after the death of the intestate, and that he received dividends upon the stock and banked the same. If he "received" dividends on the stock and banked the checks, it is certain that the checks were made payable to the intestate and that petitioner, for his own gain, unlawfully wrote the name of the intestate on the backs of the checks. His possession of the stock after the death of the intestate can have but little weight if it be assumed that the intestate kept the stock in his room in the home. (See Rothwell v. Taylor, *supra*, p. 232.) But did the intestate keep seventeen certificates of stock, some of them, at least, valuable, in a bureau drawer in his room? Mrs. Newcombe testified that petitioner told her that he and the intestate "had a vault. We both kept our valuables in there; both John and I had our valuables in there;" that she then said to petitioner, "Well, you know what that will mean. It is only going to mean you won't be able to get into the vault until it is probated in Court;" to which petitioner answered, "I took care of that. About a month ago I went down and I cleaned it up. I got mine, * * * Now it goes to Court, and before I let the others get it I will let the Court eat it up." Mrs. Newcombe also testified that petitioner told her that the intestate did not know that he went to the vault; that "John never goes down to the vault anyway. I took care of his business for him;" and "They will have a hard time finding out what I took out of the box;" that he transferred the rest of the

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stuff to another vault. The only specific denials that petitioner made to the testimony of Mrs. Newcombe were that he never talked with her about a will, and that he did not say anything to her about having a joint vault. He did not testify, however, that he and the intestate did not have a "joint vault." Some of the stocks were dated ten years before the death of the intestate, so that it is clear that the intestate had been buying stocks for at least ten years, and it is hard to believe that he kept the seventeen certificates in his bedroom.

To make out a semblance of a prima facie case of a gift inter vivos petitioner is compelled to rely upon the testimony of his daughter, Helen. While Michael Preib, his son, and Ruth Preib, his daughter-in-law, testified to the alleged delivery of a package to petitioner, it is conceded, as it must be, that their testimony does not tend to prove the contents of the package. Although Helen testified in the Probate court proceedings the judge of that court disallowed the claim, and it is plain that his judgment was a just one. In that court she testified that she did not examine the certificates when the intestate signed them; that she knew they were stocks because the intestate told her they were; that she did not read the stocks; that she did not read the certificates. In a bold attempt to bolster up her father's claim she materially changed her testimony in the Circuit court. She there testified that from what she saw on September 13, 1936, she was able to identify all of the seventeen certificates of stock that she claimed her uncle signed on that date; that while she "didn't read the whole thing, no, but I read the names. I knew what they were." She testified that when the intestate signed his name on the back of the stocks he told her that he "was giving them to her dad and that they were to be his own property for himself." It is singular that if the intestate signed the seventeen certificates of stock on September 13, 1936, for the purpose of giving them

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to petitioner that he did not have her witness his signatures. Why have her watch him when he wrote his name on the certificates? As the intestate had been purchasing stocks for ten years or more, it is reasonable to assume that he knew something about the manner in which stocks are assigned. If he intended to give the stocks to petitioner, why did he not write in the name of petitioner in the blank space on the back of the certificates provided for the name of an assignee? He did not do so. It is admitted that Helen did not write her name on the nine certificates upon which her name appears, as a witness to the signature of the intestate. It was finally admitted by counsel for petitioner and Helen during the instant proceedings that she did not write her name on the certificates until some time in February, 1937, when she wrote her name on nine of the certificates that were valuable at the request of "her counsel." The names of these stocks are Socony-Vacuum Corporation, Continental Motors Corporation, Ohio Oil Company, Yellow Truck & Coach Mfg. Company and The Studebaker Corporation. Why did "her counsel," who also represents petitioner, have her at that time write upon the said certificates not only her name, but the date, "Sept. 13, 1936," which was the date that she claims the intestate signed the stocks. The answer is apparent. Stocks cannot be sold upon the New York Stock Exchange without a witness to the signature of the assignor of the stock. It is clear that the signing by Helen in February was an attempt to have it appear that she had witnessed the signatures of the intestate during the lifetime of the latter, and upon the day that she testifies the intestate wrote his name upon the certificates. But the photostatic copies of the backs of the certificates show plainly that the name of the intestate was written in an entirely different ink from that used by Helen when she wrote her name upon the certificates. Her signing was intended to make the stocks salable. Indeed, counsel for petitioner states that "she only signed the stocks

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from that read by Helen when she wrote her name upon the certifi-
cates. Her signing was intended to make the stocks valid. Instead,
counsel for petitioner states that "she only signed the stocks

having value under Mr. Collins' advice and direction." But even after she signed the certificates petitioner was unable to dispose of the stocks because John Preib was dead and the New York Stock Exchange would require proper Probate court action before it would handle the stock, and petitioner was finally forced to file his complaint in the Circuit court, on April 21, 1938. We are constrained to say that we are unable to see what good purpose could be served by the action of petitioner's counsel in having Helen sign her name and the words, "Sept. 13, 1936," upon certain of the certificates in February, 1937. The trial court in the instant case finally caused petitioner's attorney to concede that Helen did not sign her name as a witness to the signature of the intestate. Upon the instant trial Helen testified repeatedly that she signed her name to certain of the certificates "as a witness" on October 12, 1936, and it was only after counsel for petitioner stated to the court that she was mistaken and that she "witnessed" the certificates in February, 1937, that she finally stated that she signed her name upon the later date, when "her attorney, Mr. Collins, brought them to her home." Counsel for petitioner stated to the court that she signed the certificates in Mr. Collins' office. In any event, she only signed her name to the most valuable stocks owned by the intestate, in furtherance of an effort to dispose of the stock.

But the testimony of Helen upon the instant trial fails to make out a prima facie case as to what was in the package that she testifies she saw the intestate hand her father on the evening of October 12. She testified upon direct that the package "was wrapped in newspaper, and there was a string tied around it, and it was about nine inches long and four inches wide and about an inch thick. * * * He handed it to my dad and my dad took it and put in his room," and that she never saw the package again until

having value under Mr. Collins' advice and direction." But even after she signed the certificated petition was unable to dispose of the stocks because John was dead and the New York Stock Exchange would require proper Probate court action before it would handle the stock, and petitioners were finally forced to file his complaint in the Circuit Court on April 11, 1938. They are constrained to say that we are unable to see what good purpose could be served by the action of petitioner's counsel in having Helen sign her name and the words, "Sept. 11, 1938," upon certain of the certificated in February, 1937. The trial court in the instant case finally granted petitioner's attorney to concede that Helen did not sign her name as a witness to the signature of the intestate. Upon the instant trial Helen testified repeatedly that she signed her name to certain of the certificated as a witness on October 12, 1936, and it was only after counsel for petitioner stated to the court that she was mistaken and that she "witnessed" the certificated in February, 1937, that she finally stated that she signed her name in the last place, when "my attorney, Mr. Collins, brought them to my home." Counsel for petitioner stated to the court that she signed the certificated in Mr. Collins' office. In any event, she only signed her name to the most valuable stocks owned by the intestate, the last names of an effort to dispose of the stock.

But the testimony of Helen on the instant trial fails to make out a prima facie case as to what she and perhaps that she testified she did in the last place on the evening of October 12. The testimony of the other witnesses was wrapped in newspaper, and there was nothing to be seen, and it was about nine inches long. The testimony of the other witnesses is that he handed it to my wife and she put it in his room," and that she never saw the package again.

it was brought to her home by Mr. Collins in February, 1937, for her to sign. Counsel for petitioner admits, as he must, that she did not see what was contained in the package that was handed petitioner on October 12, but he argues that her testimony shows that the package that was handed petitioner was a package "of the same dimensions and wrapped in the same way" as was the package that the intestate took into his bedroom on September 13, 1936, after he had written his name upon the certificates and that this evidence proves circumstantially that the package handed to petitioner on October 12 contained the certificates in question. Under all the facts of this case we cannot agree with this argument. It is the settled law of this State that the proof to sustain a gift inter vivos must be clear and convincing, and as we read this record we are forced to the conclusion that the petitioner has not successfully sustained the burden imposed upon him. We may say, in conclusion, that the argument of petitioner's counsel that the evidence of Mrs. Newcombe may be disregarded entirely because she was a sick woman for years, does not appeal to us. If she tells the truth - and we see no good reason to question her veracity - petitioner intended to loot the estate of the intestate. Circumstances in evidence tend strongly to corroborate her testimony.

The order of the Circuit court of Cook county is reversed and the cause is remanded with directions to the court to enter an order that the certificates of stock described in the petition are not the property of petitioner but were the property of John J. Preib at the time of his death, and now belong to the estate of John J. Preib, deceased.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Friend, P. J., and Sullivan, J., concur.

MAY RICHARDS SNOW and CHICAGO TITLE & TRUST COMPANY, as executors under the last will and testament of Edgar M. Snow, deceased, surviving partner of the partnership of Edgar M. Snow and Andrew S. Brock, doing business as Edgar M. Snow & Company, Appellants,

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

v.

ALEXANDER S. SCHULMAN, Appellee.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action at law originally brought by Edgar M. Snow and Andrew A. Brock, partners, doing business as Edgar M. Snow & Company, for commission alleged to be due for negotiating a loan of \$800,000 from the New England Mutual Life Insurance Company to the defendant, Alexander S. Schulman. It is claimed that after the loan had been negotiated defendant refused to take it since he had secured a larger loan elsewhere. Both of the original plaintiffs died during the pendency of this suit and the executors of Snow, the surviving partner, were substituted in their place.

This is the second time that this case has been before this court. It was first heard upon an arbitration agreement before former Judge Charles M. Thomson, as arbitrator. The arbitrator made an award in favor of plaintiffs for \$28,000 plus interest thereon at the rate of 5% from April 22, 1925. Judgment was entered on said award. That judgment was affirmed by this court (Snow v. Schulman, 266 Ill. App. 289), but was reversed and the cause remanded to the trial court by the Supreme court (Snow v. Schulman, 352 Ill. 63). After the mandate of the Supreme court had been filed in the trial court the arbitration was abandoned and the cause tried by the court without a jury on the evidence in the original record and additional evidence presented by plaintiffs. This trial resulted in a finding and

MAY RICHARDS SNOW AND CHICAGO TRUST
 COMPANY, as executors under
 the last will and testament of
 Edgar M. Snow, deceased, surviving
 partner of the partnership of Edgar
 M. Snow and Andrew A. Brock, doing
 business as Edgar M. Snow & Company,
 Appellants,

v.

ALEXANDER S. SCHULMAN,
 Appellee.

MR. JUSTICE SULLIVAN delivered the opinion of the court.

This is an action at law originally brought by Edgar
 M. Snow and Andrew A. Brock, partners, doing business as Edgar
 M. Snow & Company, for contribution alleged to be due for
 negotiating a loan of \$200,000 from the New England Mutual Life
 Insurance Company to the defendant, Alexander S. Schulman. It
 is claimed that after the loan had been negotiated defendant
 refused to take it since he had secured a larger loan elsewhere.
 Both of the original plaintiffs filed during the pendency of
 this suit and the execution of Snow, the surviving partner,
 were substituted in their place.

This is the second time that this case has been before
 this court. It was first tried upon an arbitration agreement
 before former Judge Charles A. Johnson, as arbitrator. The
 arbitrator made an award in favor of plaintiffs for \$28,000
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 Judgment was entered on said award. That judgment was affirmed
 by this court (Snow v. Schulman, 302 Ill. App. 229), but was
 reversed and the cause remanded to the trial court by the Supreme
 court (Snow v. Schulman, 322 Ill. 63). After the award of the
 Supreme court had been filed in the trial court the arbitration
 was abandoned and the cause tried by the court without a jury on
 the evidence in the original record and without a verdict
 presented by plaintiffs. This trial resulted in a finding

EDGAR M. SNOW
 ANDREW A. BROCK,
 Plaintiffs,

judgment in favor of defendant, from which plaintiffs appeal.

For a clearer appreciation of the questions presented on this appeal it is important and necessary to examine the facts as they appeared in the record on the prior appeal and the conclusions reached by the Supreme court on the questions of law then presented. To that end we deem it appropriate to quote at length from the opinion filed by the Supreme court on the former appeal. There, in Snow v. Schulman, 352 Ill. 63, the court said:

"This cause is here on certiorari to review a judgment of the Appellate Court for the First District affirming, on appeal, a judgment rendered by the Circuit court of Cook county on an arbitrator's award finding that Edgar M. Snow & Co. was entitled to receive \$28,000, with interest at five per cent per annum from April 2, 1925, from Alexander S. Schulman, as a commission for procuring the acceptance of a loan of \$300,000 from the New England Mutual Life Insurance Company to Schulman.

"In the trial court the parties entered into an arbitration agreement, by the terms of which '(1) all questions of law or fact at issue between the parties, as fixed in the pleadings filed in said suit, shall be, and they are hereby, irrevocably submitted to Charles M. Thomson as arbitrator, and the pleadings in such suit and depositions shall be introduced in evidence before the arbitrator; (2) the arbitrator shall hear such evidence and arguments as he may deem necessary to determine the issues raised, he being the sole judge of the admissibility, competency, relevancy, materiality and weight of the evidence, and shall decide such issues and fix the amount, if any, due the plaintiffs in said cause; *** (4) the arbitrator may on his own motion, and shall at the request of either party, at any stage of the proceedings, submit any question of law arising in the course of the reference to the opinion of the court, stating the facts upon which the question arises, and such opinion, when given, shall bind the arbitrator in making his award.'

"The arbitrator prepared an exhaustive report, taking up forty-one pages of the abstract of record. To quote from it: 'The plaintiffs, Edgar M. Snow and Andrew A. Brock, are partners engaged in the real estate business under the name and style of Edgar M. Snow & Co. The defendant, Alexander S. Schulman, had undertaken to close his purchase of two contiguous pieces of property on May 15, 1925. These pieces of property are referred to in the testimony as the Bass property, located at the northeast corner of Dearborn and Harrison streets, Chicago, and the Ellsworth property, adjoining the Bass property on the north. In connection with his purchase of those properties the defendant on April 1, 1925, made application in writing to the plaintiffs for a loan of \$1,000,000, agreeing therein to pay the plaintiffs a commission of three and one-half per cent on the amount of said loan, provided they procured the acceptance of that application. It is the claim of the plaintiffs that they did procure such acceptance by a lender ready, willing and able to make the loan on the terms set out in the application, and that therefore they are entitled to the commission stipulated by the terms of the application. Claiming the contrary, the defendant

judgment in favor of defendant, from which plaintiff appeals.

For a clearer appreciation of the questions presented on

this appeal it is important and necessary to examine the facts as

they appeared in the record on the prior appeal and the conclusions

reached by the Supreme Court on the questions of law then presented.

To that end we deem it proper to quote at length from the

opinion filed by the Supreme Court on the former appeal. There,

in Snow v. Schulman, 352 Ill. 65, the court said:

"This cause is here on appeal to review a judgment of the Appellate Court for the First District, Chicago, on appeal from a judgment rendered by the Circuit Court of Cook County on an arbitrator's award fixing the amount of damages to be paid by defendant to plaintiff, with interest at five per cent per annum from April 2, 1925, from Alexander M. Schulman, as a commission for procuring the acceptance of a loan of \$800,000 from the New England Mutual Life Insurance Company to defendant.

"In the trial court the parties entered into an arbitration agreement, by the terms of which (1) all questions of law or fact at issue between the parties, as filed in the pleadings filed in said suit, shall be, and they were, respectively, irrevocably submitted to Charles M. Thomson as arbitrator, and the pleadings in such suit and depositions shall be introduced in evidence before the arbitrator; (2) the arbitrator shall have full power and authority as he may deem necessary to determine the issues raised, he being the sole judge of the facts, including competency, relevancy, materiality and weight of the evidence, and shall, in such cases, and fix the amount, if any, of the plaintiff's claim; and (4) the arbitrator may on his own motion, and shall, at the request of either party, at any stage of the proceedings, submit any question of law arising in the course of the reference to the opinion of the court, stating the facts upon which the question arises, and such opinion, when given, shall bind the arbitrator in making his award."

"The arbitrator prepared an arbitral report, finding up forty-one pages of the record of the case, and the following: 'The plaintiffs, Edgar L. Snow and Andrew J. Snow, and defendant, Alexander M. Schulman, have entered into an arbitration agreement, by the terms of which (1) all questions of law or fact at issue between the parties, as filed in the pleadings filed in said suit, shall be, and they were, respectively, irrevocably submitted to Charles M. Thomson as arbitrator, and the pleadings in such suit and depositions shall be introduced in evidence before the arbitrator; (2) the arbitrator shall have full power and authority as he may deem necessary to determine the issues raised, he being the sole judge of the facts, including competency, relevancy, materiality and weight of the evidence, and shall, in such cases, and fix the amount, if any, of the plaintiff's claim; and (4) the arbitrator may on his own motion, and shall, at the request of either party, at any stage of the proceedings, submit any question of law arising in the course of the reference to the opinion of the court, stating the facts upon which the question arises, and such opinion, when given, shall bind the arbitrator in making his award.'"

resisted payment of the commission, which resulted in this suit brought by the plaintiffs against the defendant for its recovery.' It is conceded that the original application was amended so that it specified that the amount of the loan was to be \$800,000 instead of \$1,000,000.

* * *

"After the arbitrator had prepared his report the publication of the award was postponed to enable the parties to submit to the court 'any question or questions of law involved herein, should they choose so to do.' Thereafter four questions of law were submitted to the court by plaintiff in error, Schulman. The questions and the court's answers to the same are as follows:

"1. Was the plaintiff required, in order to earn said commission, to procure, within the time limited, a legally valid acceptance of defendant's application, for breach of which by the acceptor of the application an action by defendant would lie? - Yes, the arbitrator has specifically ruled to such effect in his opinion, at pages 24, 25.

"2. Did the action of the finance committee constitute an acceptance of defendant's application? - No, but in the opinion of the court it was not necessary to a binding acceptance by the insurance company of the defendant's application that the action of the finance committee constitute such an acceptance. In the opinion of the court the action of the finance committee constituted an approval of the proposed loan to the defendant, which was all that was necessary so far as the finance committee was concerned, and, following that, in the opinion of the court there was a valid and binding acceptance by the insurance company of the defendant's application for the loan, as found by the arbitrator in his opinion, at page 27.

"3. Since the lender - the acceptor of the application - was by the terms of the application to loan a part of the amount applied for more than one year after the time limited for securing the acceptance, was the acceptance required to be in writing, signed by the acceptor of the application or by some person thereunto by the acceptor lawfully authorized? - No, but in the opinion of the court this question is entirely immaterial in view of the fact that the arbitrator has found, at page 27 of his opinion, that a valid and binding acceptance of the application for the loan was made in writing, which finding the court approves.

"4. Defendant having no information, either at the time he was notified by plaintiff that his application had been accepted by said insurance company, or at the time said loan fell through, or until the taking of the depositions after suit begun on the above claim, of the above facts as to the action of the finance committee of the insurance company and the extent of its authority in the making of loans and the acceptance of applications therefor, is defendant now barred from claiming that the New England Mutual Life Insurance Company never accepted all the material terms of his application, or that its acceptance was not a legally valid one, or that such acceptance, not being by a writing signed by the insurance company or by its duly authorized agent, was not valid? - No, the defendant is not barred from making the claims referred to, but the arbitrator has made findings that none of the claims are tenable, and the court approves those findings.

"And the court having stated its opinion with respect to the said propositions of law so submitted to the court by counsel

resisted payment of one dollar, which was the amount of the loan, brought by the plaintiff against the defendant for its recovery. It is conceded that the original application was made to the court at \$1,000,000, it specified that the amount of the loan was to be \$1,000,000, instead of \$1,000,000.

"* * *

"After the application had prepared the report the public- tion of the award was postponed to enable the parties to submit to the court any question or objection of law involved herein, should they choose so to do. The defendant's own question of law were submitted to the court by plaintiff in error, because the questions and the court's answers to them are as follows:

"11. Was the award, as the plaintiff contended, in order to give said commission, to proceed, under the time limited, a legally valid acceptance of defendant's application, for breach of which by the acceptor of the application by the defendant was liable? - Yes, the arbitrator has specifically ruled to such effect in his opinion, at pages 24, 25.

"12. Did the action of the Finance Committee constitute an acceptance of defendant's application? - No, but in the opinion of the court it was not necessary to a binding acceptance by the insurance company of the defendant's application that the action of the Finance Committee constituted such an acceptance. In the opinion of the court the action of the Finance Committee constituted an approval of the proposed loan to the defendant, which was all that was necessary so far as the Finance Committee was concerned, and following that, in the opinion of the court, that was a valid and binding acceptance by the insurance company of the defendant's application for the loan, as found by the arbitrator in his opinion, at page 27.

"13. Since the Finance Committee - the acceptor of the application - was by the terms of the application to loan a part of the amount applied for more than one year after the time limited for accepting the acceptance, was the acceptance required to be in writing, signed by the acceptor of the application or by some person authorized by the acceptor lawfully authorized? - No, but in the opinion of the court this question is entirely immaterial in view of the fact that the arbitrator has found, at page 27 of his opinion, that a valid and binding acceptance of the application for the loan was made in writing, which finding the court approves.

"14. Defendant claiming no interest thereon, since at the time he was notified by plaintiff that the application had been accepted by said insurance company, or at the time said loan was made, or until the taking of the conditions thereon, and before on the day of the above stated date, the action of the Finance Committee of the insurance company and the action of it separately in the making of loans and the acceptance of the loan, and the defendant now claims that the Finance Committee of the insurance company never accepted the application, or that the acceptance of the application by the insurance company was not binding by a written acceptance by the insurance company or by the duly authorized agent, was not valid, - no, the defendant is not carried thereon in the findings of the court, and the arbitrator has made findings that none of the above is true, and the court approves these findings.

"And the court having accepted the opinion of the arbitrator to the said proposition of 1, it is so ordered that the court by plaintiff

for the defendant, it is ordered that the opinion of this court as so stated shall bind the arbitrator in making his award herein as provided in the agreement of the parties hereinabove referred to.'

"After the court had considered these questions and 'had passed upon them but had not entered the order,' the arbitrator, at the request of Schulman, submitted to the court a fifth question, as follows:

"'5. Did the letter of Wallace D. Dexter, Jr., to John Jeffries & Sons, dated April 22, 1925, constitute an acceptance of defendant's application?"

"The court refused to pass upon this question. The arbitrator then made his award, in which he stated 'that the facts established by the evidence' are 'as specifically set out in the findings.'

"In this case there is no dispute in the evidence as to the material evidentiary facts. On April 1, 1925, plaintiff in error, Schulman, in writing, engaged defendants in error to procure for him a loan of \$1,000,000 on specified terms and agreed to pay as commission three and one-half per cent on the amount of the loan. On April 3, 1925, defendants in error wrote John Jeffries & Sons, of Boston, their correspondents, stating that they had Schulman's application for a \$1,000,000 loan and solicited their assistance in the matter. Jeffries saw a Mr. Dexter, assistant secretary of the New England Mutual Life Insurance Company, gave him defendants in error's letter and asked whether a loan could be made. Dexter prepared a memorandum of application from that letter to submit to the finance committee of the insurance company, which had the sole power to accept applications or to make loans for that company. Dexter mistakenly prepared the application for a loan to the Ellsworth Building Corporation, which the letter stated Schulman was about to incorporate, instead of to Schulman. After considerable negotiation, on April 17 Schulman made an amended application for \$800,000 upon certain specified terms. The records of the finance committee of the New England Mutual Life Insurance Company show no action of the finance committee upon this application but do show that at a meeting of that committee on April 22, 1925, 'it was voted to lend the Ellsworth Building Corporation \$800,000 for seven years at six per cent, \$12,000 to be repaid semi-annually to November 1, 1927, and \$20,000 semi-annually thereafter to November 1, 1931, and the balance of \$580,000 on May 1, 1932, to be secured by first mortgage of real estate on the northeast corner of Harrison and Dearborn streets, Chicago.' This action of the finance committee, as shown by its records does not correspond either with the name of the party to whom the loan was to be made or the terms upon which it was to be made, or with the application made by Schulman for the loan. On the same day, Dexter, who the records show had no authority to bind the company to make a loan, wrote to Jeffries & Sons as follows:

"'Messrs. John Jeffries & Sons,

Barristers' Hall, Boston, Massachusetts.

"'Gentlemen - As I have already telephoned you this morning, the finance committee has approved a loan of \$800,000 to the Ellsworth Building Corporation for a term of seven years from May 1 at six per cent, \$12,000 to be paid on account of the principal every six months to November 17, 1927, and \$20,000 every six months thereafter to November 1, 1931, and the balance of \$580,000 on May 1, 1932,

secured by mortgage of real estate on the northeast corner of Harrison and Dearborn streets, extending through to Plymouth court, Chicago.

"The company is to advance the sum of \$575,000 when the title has been approved and the papers have been prepared, and the balance of \$225,000 is not to be paid by the company until the new building which Mr. Schulman is to build upon the corner has been completed and the time for filing mechanics' liens has expired or a bond satisfactory to the company against such liens has been furnished. We understand that on account of present leases construction cannot begin until about May 1, 1926. Interest on balance of \$225,000 will not accrue until the money has been paid by the company.

"As soon as a signed application has been received, instructions will be forwarded to our attorneys to prepare the necessary papers.

"Yours very truly,
WALLACE D. DEXTER, Jr., Assistant
Secretary."

"It is to be noted that the terms stated in Dexter's loan correspond neither with Schulman's application nor with the record of the insurance company's finance committee. That it was not intended to be an acceptance of an application for a loan is evidenced by the last paragraph in the letter, 'As soon as a signed application has been received, instructions will be forwarded to our attorneys to prepare the necessary papers.' On April 22, 1925, another application was made by Schulman on the company's blank for a loan of \$800,000 upon terms differing from those stated in Dexter's letter and from those stated in the records of the finance committee. With reference to this application no action was ever taken by the finance committee or anyone authorized to bind the insurance company to make a loan or make a valid acceptance of a loan on behalf of the company. It is evident, therefore, that in law there never was a valid acceptance of Schulman's application for a loan to him in any amount by the insurance company. To constitute a contract by offer and acceptance the acceptance must conform exactly to the offer, and although a reply to an offer purports to accept the offer, it is not an acceptance but is a counter-offer and does not create a contract where it adds qualifications and requires the performance of new conditions. (Worley v. Holding Corporation, 348 Ill. 420.) A letter written in reply to an offer, which restates the terms of the offer but with some variations, though slight, cannot be regarded as the consummation of a contract and requires an acceptance upon the terms thus stated, and until unequivocally accepted is a mere proposition or offer. MacLay v. Harvey, 90 Ill. 525.

"* * *

"In response to question 2, before quoted, the court properly held that the action of the finance committee did not constitute an acceptance of defendant's application. The court then erroneously held as a matter of law that following the approval of the finance committee there was a valid and binding acceptance by the insurance company of the defendant's application for the loan, as found by the arbitrator in his opinion at page 27. The opinion of the arbitrator was based on the letter of Dexter to Jeffries, as there was no other evidence in the record at any place tending to show that there was

secured by mortgage of real estate on the northeast corner of Harrison and Dearborn streets, extending through to Plymouth Court, Chicago.

"The company is to advance the sum of \$225,000 when the title has been approved and the papers have been prepared, and the balance of \$225,000 is not to be paid by the company until the new building which Mr. Schuman is to build upon the corner has been completed and the time for filling mechanics' liens has expired. On a bond satisfactory to the company certain monies have been furnished. We understand that on account of present losses construction cannot begin until about May 1, 1926. Interest on balance of \$225,000 will not accrue until the money has been paid by the company.

"As soon as a signed application has been received, instructions will be forwarded to our attorneys to prepare the necessary papers.

"Yours very truly,
WILLIAM D. DEXTER, Jr., Assistant Secretary.

"It is to be noted that the terms stated in Dexter's loan correspond neither with Schuman's application nor with the record of the insurance company's finance committee. That it was not intended to be an acceptance of an application for a loan is evidenced by the last paragraph in the letter. As soon as a signed application has been received, instructions will be forwarded to our attorneys to prepare the necessary papers. On April 22, 1925, another application was made by Schuman on the company's blank for a loan of \$800,000 upon terms differing from those stated in Dexter's letter and from those stated in the records of the finance committee. With reference to this application no action was ever taken by the finance committee or anyone authorized to bind the insurance company to make a loan or make a valid acceptance of a loan on behalf of the company. It is evident, therefore, that in law there never was a valid acceptance of Schuman's application for a loan to him in any amount by the insurance company. To constitute a contract by offer and acceptance the acceptance must conform exactly to the offer, and although a reply to an offer purports to accept the offer, it is not an acceptance but is a counter-offer and does not create a contract when it adds conditions and requires the performance of new conditions. (Forty v. Forting Corporation, 348 Ill. 420.) A letter written in reply to an offer, which restates the terms of the offer but with some variations, though slight, cannot be regarded as the completion of a contract and requires an acceptance upon the terms first stated, and until unambiguously accepted is a mere proposition of contract. (Harvey, 90 Ill. 525.)

"In response to question 2, it is noted, the court properly held that the action of the finance committee did not constitute an acceptance of defendant's application. The court then erroneously held as a matter of law that following the approval of the finance committee there was a valid and binding acceptance by the insurance company of the defendant's application for the loan, as found by the arbitrator in his opinion at page 27. The opinion of the arbitrator was based on the letter of Dexter to Forting, as there was no other evidence in the record at any place tending to show that there was

a valid and binding acceptance by the insurance company of Schulman's application for the loan. There was no basis for the finding of the arbitrator, or of its approval, as a matter of law, by the court.

"By the terms of the application for a loan the contract for the making of the loan was not to be completed within one year from the time of the acceptance of the application or the making of the contract, and it was therefore necessary that the acceptance of the application, or some note or memorandum thereof, if it were accepted, must, to be valid, be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. (Cahill's Stat. 1931, chap. 59, sec. 1.) The court not only erred in answering question 3 in the negative, but also erred in holding as a matter of law, that it was immaterial whether the acceptance was required to be in writing, and it approved, as a matter of law, a finding of the arbitrator that a valid and binding acceptance of the application for the loan was made in writing, when the fact is no valid and binding acceptance of the application for the loan was made in writing or otherwise. The finding of the court being founded on page 27 of the arbitrator's opinion, and such opinion being based solely on the letter of Dexter to John Jeffries & Sons dated April 22, 1925, the fifth proposition which counsel for Schulman sought to have submitted became very material, as it was the only letter or writing of anyone in the employ of the insurance company with reference to the acceptance of Schulman's application.

"Counsel for defendants in error claim that the request of counsel for the submission of the fifth proposition came too late. Section 6 of the Arbitration and Awards act, quoted above, provides that such questions of law may be submitted 'at any stage of the proceedings.' This language is plain and unambiguous. The arbitrator had not yet made his report and the court had not answered the questions already propounded. There being no controversy as to the salient facts in the case, the conclusion to be drawn therefrom was one as to their sufficiency at law. The answers of the court to the questions mentioned, and its refusal to allow the fifth question to be submitted, were erroneous.

"The judgments of the Appellate Court and of the Circuit court are therefore reversed and the cause remanded to the Circuit court."

Hereinafter for convenience the term "plaintiffs" will be used to refer to Snow and Brock, the original plaintiffs.

As has been shown, in answer to the first proposition of law submitted by the arbitrator on the original hearing of this cause, the trial court held that in order to recover plaintiffs were required to show that there was a legally valid acceptance by the insurance company of the application for the loan, within the time limited, for breach of which, by the acceptor of the application, an action by the applicant would lie. The trial court's ruling in this regard was not questioned by either of the parties

and its propriety was recognized by the Supreme court in its opinion.

It is important to note that the Supreme court held that since it was undisputed that the finance committee of the insurance company had "the sole power to accept applications or to make loans for that company," the action of the finance committee as indicated by its minutes failed to show the approval of a loan to Schulman or the acceptance of his application for a loan in that said minutes referred to a loan to the "Ellsworth Building Corporation" and to a loan on different terms than those proposed by Schulman and that the letter from Dexter to Jeffries & Sons, set forth in its opinion, did not constitute "a valid and binding acceptance by the insurance company of Schulman's application for the loan." It is also important to note that the Supreme court held that, since "by the terms of the application for a loan the contract for the making of the loan was not to be completed within one year from the time of the acceptance of the application or the making of the contract," the Statute of Frauds was applicable and that, inasmuch as the letter of April 22, 1925, from Dexter to Jeffries & Sons "was the only letter or writing of anyone in the employ of the insurance company with reference to the acceptance of Schulman's application," there was no valid and binding acceptance of Schulman's application for the loan made in writing or otherwise.

As stated by the Supreme court, the action of the finance committee of the insurance company as shown by its minutes "does not correspond either with the name of the party to whom the loan was to be made or the terms upon which it was to be made, or with the application made by Schulman for the loan" and "the terms stated in Dexter's loan correspond neither with Schulman's application or the record of the insurance company's finance committee." After further stating that "on April 22, 1925, another application was made by Schulman on the company's blank for a loan of \$800,000

and its propriety was recognized by the supreme court in its opinion.

It is important to note that the supreme court held that

since it was undisputed that the finance committee of the insurance company had "the sole power to accept applications or to make loans for that company," the action of the finance committee as indicated

by its minutes failed to show the approval of a loan to Schulman

or the acceptance of his application for a loan in that said minutes referred to a loan to the "Ellsworth Building Corporation" and to

a loan on different terms than those proposed by Schulman and that the letter from Dexter to Leffler & Sons, set forth in its opinion,

did not constitute "a valid and binding acceptance by the insurance

company of Schulman's application for the loan." It is also important to note that the supreme court held that, since "by the terms of the

application for a loan the contract for the making of the loan was not to be completed within one year from the time of the acceptance

of the application or the making of the contract," the absence of Trade was applicable and that, inasmuch as the letter of April 22,

1925, from Dexter to Leffler & Sons "was the only letter on writing of anyone in the employ of the insurance company with reference to

the acceptance of Schulman's application," there was no valid and binding acceptance of Schulman's application for the loan made in

writing or otherwise.

As stated by the supreme court, the action of the finance

committee of the insurance company as shown by its minutes "does not correspond either with the action of the body to whom the loan

was to be made or the terms upon which it was to be made, or with the application made by Schulman for the loan" and "the terms

stated in Dexter's loan correspondence with Leffler & Sons' application or the record of the insurance company's finance committee."

After further stating that "on April 22, 1925, another application was made by Schulman on the company's blank for a loan of \$500,000

upon terms differing from those stated in Dexter's letter and those stated in the records of the finance committee" and that "with reference to this application no action was ever taken by the finance committee or anyone authorized to bind the insurance company to make a loan or make a valid acceptance of a loan in behalf of the company," the Supreme court concluded that "in law there never was a valid acceptance of Schulman's application for a loan to him in any amount by the insurance company."

The law of this case is settled in so far as the evidence contained in the record on the former appeal is concerned. However, in the determination of the questions presented on this appeal plaintiffs are entitled to have such additional evidence as they have introduced upon the second trial considered along with the evidence presented at the first trial. They state in their brief that their additional evidence shows:

"1. That the Finance Committee, in passing on the application not only took the action shown in its minutes, but also had before it the original application setting forth the terms of the loan, and the telegrams and correspondence amending that application; that the members of the Committee made a written, signed indorsement on that specific application, approving by the abbreviation 'O.K.' the actual loan applied for; and that plaintiffs' Boston correspondent, John Jeffries & Sons, on authorization from the Insurance Company immediately wrote and wired plaintiffs that the Company had accepted the loan.

"2. That after the action of the Finance Committee on the original application, the officers of the Insurance Company who took and acted upon the second application on the insurance company's form, were authorized to act upon it and accept it, and that acting for the Company they did accept it.

"3. That Foster, the general counsel, was also Vice President of the Company, and was authorized to act for it in the closing of loans, and that he not only sent the letter in the first record

upon terms differing from those stated in Carter's letter and those stated in the records of the finance committee" and that "with reference to this application no action was ever taken by the finance committee or anyone authorized to bind the insurance company to make a loan or serve a valid acceptance of a loan in behalf of the company," the Supreme Court concluded that "in law there never was a valid acceptance of defendant's application for a loan to him in any amount by the insurance company."

The law of this case is settled in so far as the evidence contained in the record on the former appeal is concerned, however, in the determination of the questions presented on this appeal plaintiffs are entitled to have such additional facts as they have introduced upon the second trial considered along with the evidence presented at the first trial. They stand in their brief that their additional evidence shows:

"1. That the finance committee, in passing on the application not only took the action shown in its first, but also had before it the original application setting forth the terms of the loan, and the telegrams and correspondence amounting to a solicitation that the members of the committee made a written, signed instrument on that specific application, approving by the resolution 'U. S. the actual loan applied for; and that plaintiffs' Boston correspondent, John Jeffrey, on authorization from the insurance company immediately wrote and wired plaintiffs that the company had accepted the loan."

"2. That after the action of the finance committee on the original application, the officers of the insurance company who acted upon the second application on the insurance company's part were authorized to act upon it and accept it, and that acting for the company they did accept it."

"3. That Carter, the general counsel, was also Vice President of the company, and was authorized to act for it in the closing of loans, and that he not only sent the letter in the first record

instructing Chicago counsel to close the loan, but also wired Chicago counsel unequivocally that the application for loan was accepted and advised Jeffries that he had sent that wire; and that Jeffries immediately wired and wrote plaintiffs informing them of Foster's action."

After stating in their brief that "the judgment of the trial court is based on its finding in effect that despite the additional evidence above referred to, the record was still insufficient to show that plaintiffs had procured an acceptance by the Insurance Company of the defendant's application for a loan in form sufficient to bind the lender and hence that plaintiffs had failed to prove their right to commission," plaintiffs state that they rely on the following propositions for the reversal of the judgment:

"1. The evidence shows a binding acceptance by the Insurance Company of the application for loan.

"(a) By the action of the Finance Committee on the specific application for loan before it; and

"(b) In addition, and in the alternative, by the action of the company's officers on the formal application.

"2. There was a sufficient memorandum in writing of the acceptance of the application to satisfy the Statute of Frauds, either:

"(a) In the memoranda endorsed on the application papers by the members of the Finance Committee;

"(b) In the letter and telegram of Jeffries to plaintiffs advising them of the acceptance by the Finance Committee;

"(c) In the letter and telegram of Reginald Foster, Vice-President and General Counsel of the Insurance Company, advising his Chicago correspondents of the acceptance of the application;

"(d) In the letter and telegram from Jeffries to plaintiffs advising them of Foster's action and that the loan was accepted."

Defendant's theory is that "the evidence still does not show an acceptance of the original application by the insurance company;" that "the subsequent application on the company's form was never accepted by the company;" that "the evidence does not show a sufficient memorandum in writing of the acceptance of the

-2-

instructing Chicago counsel to close the loan, but also wired Chicago counsel unequivocally that the application for loan was accepted and advised Teller that he had sent that wire; and that Teller immediately wired and wrote plaintiffs informing them of Foster's action."

After stating in their brief that "the judgment of the trial court is based on its finding in effect that despite the additional evidence above referred to, the record was still insufficient to show that plaintiffs had procured an acceptance by the Insurance Company of the defendant's application for a loan in form sufficient to bind the lender and hence that plaintiffs had failed to prove their right to commission," plaintiffs state that they rely on the following propositions for the reversal of the judgment:

- "1. The evidence shows a binding acceptance by the Insurance Company of the application for loan.
- "(a) By the action of the Finance Committee on the specific application for loan before it; and
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- "(a) In the memorandum endorsed on the application papers by the members of the Finance Committee;
- "(b) In the letter and telegram of Teller to plaintiffs advising them of the acceptance by the Finance Committee;
- "(c) In the letter and telegram of Teller to Foster, Vice-President and General Agent of the Insurance Company, advising him to go correspondence of the acceptance of the application;
- "(d) In the letter and telegram from Teller to plaintiffs advising them of Foster's action in that the loan was accepted."

Defendant's theory is that "the evidence still does not show acceptance of the original application by the Insurance Company," that "the subsequent application by the company's loan was never accepted by the company," that "the evidence does not show a sufficient memorandum in writing of the acceptance of the

application to satisfy the Statute of Frauds;" that "the law of the case is that the plaintiffs were required, in order to earn their commission, to procure within the time limit a legally valid acceptance of defendant's application, for breach of which by the acceptor of the application an action by defendant would lie;" that "no such acceptance was ever communicated to defendant;" that "plaintiffs were not entitled to a trial de novo by the Court under the pleadings or by the Arbitrator under the submission;" and that "the whole matter is res adjudicata, there being no new evidence introduced."

The first question presented is whether there was additional evidence introduced on the second trial which, considered with that presented on the first trial, shows a binding acceptance by the insurance company of Schulman's application for a loan of \$800,000. The only additional evidence in this regard is a memorandum in handwriting which appears on the upper portion of the first page of a photostatic copy of plaintiffs' letter of April 3, 1925, to John Jeffries & Sons, which letter was delivered by Jeffries to the insurance company as Schulman's original application for the loan. This memorandum is as follows: "\$800,000 - 7 yrs @ 6% \$575,000 now balance when new building completed OK G.A. C.B.B. D.E.A." The foregoing memorandum was not on the original application itself, which was received in evidence at the first trial. However, it is immaterial when it was erased therefrom since evidence produced on the second trial shows that it was written thereon by Dexter, assistant secretary of the insurance company, at the meeting of the finance committee of said company on April 22, 1925, when, according to the minutes of said committee, it was voted to lend the Ellsworth Building Corporation \$800,000. The initials below the memorandum are those of three members of the finance committee who constituted a majority thereof and there can be no question but that said members by placing their initials after the "O.K." on such memorandum

application to satisfy the demands of "Fidelity" and "the law of the case is that the plaintiffs were required, in order to earn their commission, to procure within the time limit a legally valid acceptance of defendant's application, for breach of which by the acceptor of the application an action by defendant would lie;" that "no such acceptance was ever communicated to defendant;" that "plaintiffs were not entitled to a trial ex hypo by the Court under the pleadings or by the Arbitrator under the submission;" and that "the whole matter is res adjudicata, there being no new evidence introduced."

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indicated their approval of the contents of same.

The record before the Supreme court on the prior appeal discloses that when the finance committee passed upon the application for the loan on April 22, 1925, and took the action heretofore stated as shown in its minutes, it had before it Schulman's ^{original} application setting forth the terms of the loan and the telegrams and correspondence amending that application. Plaintiffs insist that since they have now shown that the members of the finance committee by their signed memorandum indorsed in writing their approval of the specific application for the loan made by Schulman or in his behalf, such action by said committee approved the actual loan applied for.

In our opinion plaintiffs are in no better position with this additional evidence in the record than they were before. While Dexter testified by deposition at the second trial that he considered that the names "Schulman" and "Ellsworth Building Corporation" were used in "apposition" in the original application, both he and Jeffries testified that it was their understanding from the time the original application for the loan was made until after it had been acted upon by the finance committee of the insurance company on April 22, 1925, that the application was for a loan to be made to the Ellsworth Building Corporation and the Supreme court pointed out in its opinion that Dexter made a mistake in so presenting the application to the finance committee. In construing contracts or determining whether or not a contract has actually been made, the primary element to be considered is the intention of the parties. When Dexter wrote the memorandum on the application he clearly contemplated that the loan was to be made to the Ellsworth Building Corporation and not to Schulman and when the members of the finance committee indicated by their initials the approval of the contents of the memorandum on the application, they did not have in mind a loan to Schulman at all but a loan to the Ellsworth Building Corporation. That was the way the matter was

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presented to the members of the finance committee in an abstract of the application furnished to them by Dexter and the minutes of the finance committee show conclusively that the loan considered and approved was intended to be made to the Ellsworth Building Corporation. In view of these circumstances the mere fact that the signed memorandum was written on Schulman's application can have no conclusive significance and it is clearly insufficient to warrant a decision on this phase of the case contrary to that of the Supreme court on the prior appeal. We repeat that Dexter and the members of the finance committee considered and dealt with Schulman's original application as amended as being for a loan to the Ellsworth Building Corporation.

The record on the prior appeal discloses that when the finance committee of the insurance company approved the loan to the Ellsworth Building Corporation April 22, 1925, Dexter communicated that fact on the same day, both by telephone and letter, to Jeffries & Sons, who in turn sent a telegram and a letter to plaintiffs advising them of such approval; that plaintiffs were also advised that it would be necessary that an application on the insurance company's blank form be signed and forwarded to said company; that such an application for a loan to Schulman personally was executed and that it was mailed to and received by the insurance company; that Dexter himself accepted Schulman's formal application for the loan without submitting same to the finance committee; and that he made an abstract of this application on a printed form, captioned, "Abstract for Loan Secured by First Mortgage Accepted by New England Mutual Life Insurance Company" and delivered such abstract and the "loan papers" to Reginald Foster, the general counsel of the insurance company, who forwarded a letter to the insurance company's Chicago attorneys instructing them to examine the title to the property involved and to close the loan.

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The record on the prior appeal discloses that when the finance committee of the insurance company approved the loan to the Ellsworth Building Corporation April 28, 1928, Dexter communicated that fact on the same day, both by telephone and letter, to Jeffrey & Sons, who in turn sent a telegram and a letter toplaintiffs advising them of such approval; that plaintiffs were also advised that it would be necessary that an application on the insurance company's blank form be signed and forwarded to said company; that such an application for a loan to Schulman personally was executed and that it was mailed to and received by the insurance company; that Dexter himself accepted Schulman's formal application for the loan without submitting same to the finance committee; and that he made an abstract of this application on a printed form, captioned, "Abstract for loan secured by First Mortgage Acquired by New England Mutual Life Insurance Company" and delivered such abstract and the "loan papers" to Benjamin Foster, the general counsel of the insurance company, who forwarded a letter to the insurance company's Chicago attorneys instructing them to examine the title to the property involved and to close the loan.

On the second trial plaintiffs introduced additional evidence that Foster was a vice president of the insurance company as well as its general counsel; and that when he received from Dexter the abstract of acceptance of Schulman's formal application he sent the following telegram to the Chicago attorneys of the insurance company: "Schulman loan on Ellsworth Building accepted subject to your approval of title further instructions by mail." They also introduced additional evidence as to the custom and practice of the insurance company in handling loans, which they claim shows conclusively that whatever variations there were between Schulman's formal application and the loan to the Ellsworth Building Corporation theretofore approved by the finance committee were advantageous to the insurance company, that Dexter and Foster had authority to accept said formal application for the loan and that it was accepted. Plaintiffs' additional evidence as to the custom and practice of the insurance company in handling loans was in large measure cumulative.

In view of the fact that the finance committee of the insurance company had the sole power to accept applications for or to make loans for that company and in view of the further fact that Schulman's formal application April 22, 1925, was never submitted to said finance committee, we think that plaintiffs' factual position is not strengthened materially by the additional evidence introduced upon the second trial and that we are precluded by the conclusion reached by the Supreme court on the prior appeal as to said formal application from finding or holding that plaintiffs are any more entitled to recover on the basis of this application than they were on the first trial. In our opinion further discussion of plaintiffs' contention as to the acceptance of Schulman's formal application for loan would serve no useful purpose since the Supreme court stated with reference to this application that "no action was ever taken by the finance committee or anyone authorized to bind the

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In view of the fact that the finance committee of the insurance company had the sole power to accept applications for or to make loans for that company and in view of the further fact that Schulman's formal application April 23, 1942, was never submitted to said finance committee, we think that plaintiffs' factual position is not strengthened materially by the additional evidence introduced upon the second trial and that we are precluded by the conclusion reached by the supreme court on the prior appeal as to said formal application from finding or holding that plaintiffs are any more entitled to recover on this application than they were on the first trial. In our opinion further discussion of plaintiffs' contention as to the responsibility of Schulman's formal application for loan would serve no useful purpose since the supreme court stated with reference to this application that "no action was ever taken by the finance committee or anyone authorized to bind the

insurance company to make a loan or make a valid acceptance of a loan on behalf of the company," and that "in law there never was a valid acceptance of Schulman's application for a loan to him in any amount by the insurance company."

We are constrained to hold especially in view of the opinion of the Supreme court on the former appeal that all the evidence now in the record fails to show that plaintiffs had procured the valid acceptance by the insurance company of Schulman's application for a loan to him in any amount, and therefore we deem it unnecessary to discuss plaintiffs' contentions as to the sufficiency of the various letters, telegrams and written memoranda upon which they rely to satisfy the Statute of Frauds.

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Furthermore the Supreme court having found that the "material evidentiary facts" in the then record were undisputed and having determined all the controlling questions of law adversely to plaintiffs, we seriously doubt that it was intended that plaintiffs should be allowed a trial de novo by the trial court under the order of remandment. As heretofore stated, this cause was first heard by an arbitrator under a submission agreement, pursuant to the terms of the Arbitration act (Ill. Rev. Stat. 1937, chap. 10), and we think that the sole purpose of remanding the cause was to permit the arbitrator to conform his findings to the law governing the case as enunciated by the Supreme court.

For the reasons stated herein the judgment of the Circuit court is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

insurance company to make a loan or make a valid acceptance of a loan on behalf of the company," and that "in law there never was a valid acceptance of defendant's application for a loan to him in any amount by the insurance company."

"We are constrained to hold especially in view of the opinion of the Supreme court on the former appeal that all the evidence now in the record fails to show that plaintiff had procured the valid acceptance by the insurance company of defendant's application for a loan to him in any amount, and therefore we deem it unnecessary to discuss plaintiff's contentions as to the sufficiency of the various letters, telegrams and written memoranda upon which they rely to satisfy the Statute of Frauds."

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evidentiary facts in the then record were undisputed and having determined all the controlling questions of law adversely to plaintiff, we seriously doubt that it was intended that plaintiff should be allowed a trial de novo by the trial court under the order of remandment. As heretofore stated, this case was a trial heard by an arbitrator under a submission agreement, pursuant to the terms of the Arbitration act (Ill. Rev. Stat. 1907, chap. 110), and we think that the sole purpose of remanding this case was to permit the arbitrator to conform his findings to the law governing the case as enunciated by the Supreme court.

For the reasons stated herein the judgment of the Circuit court is affirmed.

JUDGMENT AFFIRMED.

Friend, R. J., and defendant, et al., counsel.

41623

310 L.A. 3301

ROSE KAISER,

Appellee,

APPEAL FROM

v.

CIRCUIT COURT,

PAUL KAISER,

Appellant.

COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

June 2, 1937, plaintiff obtained a decree of divorce from defendant on the ground of extreme and repeated cruelty. The decree found there were four children born as a result of the marriage, two of which were of age and the other two, Frank J. Kaiser, 18 and Marjorie Kaiser, 15 years of age. Plaintiff was given the sole care and custody of the two minor children. It was further decreed that defendant pay plaintiff for her support and that of the two children \$55 a month beginning June 12, 1937, until July 12, 1938; \$50 a month from August 12, 1938, to September 12, 1939, and \$25 a month thereafter or so long as plaintiff remained unmarried.

July 19, 1940, plaintiff filed her verified petition setting up that she had remained unmarried, some other terms of the decree and that defendant was not now in arrears in the payments required of him; that he had been paying her \$25 a month since September 12, 1939; that Frank was 21 and Marjorie 18 years of age; that at the time of the entry of the decree defendant was receiving a salary of \$150 a month from the city of Park Ridge; that at the present time \$185 a month from the same city. Other facts were alleged to the effect that plaintiff had no income except the \$25 a month; that she was paying this amount for rent of an apartment where she and her two children, Frank and Marjorie lived, and that the children were not earning any money. That she had been doing practical nursing but her health was so poor at the present time she could not do this work any longer. The prayer was that defendant be required to pay \$50 a month as and for her alimony and support.

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July 19, 1940, plaintiff filed her verified petition setting up that she had remained unmarried, some other terms of the decree and that defendant was not now in arrears in the payments required of him; that he had been paying her \$25 a month since September 15, 1939; that Frank was 21 and Marjorie 18 years of age; that at the time of the decree defendant was receiving a salary of \$150 a month from the city of Park Ridge; that at the present time \$185 a month from the same city. Other facts were alleged to the effect that plaintiff had no income except the \$25 a month; that she was paying this amount for rent of an apartment where she and her two children, Frank and Marjorie lived, and that the children were not earning any money. That she had been doing practical nursing but her health was so poor at the present time she could not do this work any longer. The prayer was that defendant be required to pay \$50 a month as and for her alimony and support.

Defendant filed a motion to strike the petition on the ground that "the decree entered *** was a consent decree and constitutes a contract between the parties, and is binding on both of them permanently unless said Plaintiff remarries," and that the two children living with plaintiff were self-supporting and paid room and board to their mother. The motion was overruled and defendant filed his answer in which he averred the decree of divorce was entered on plaintiff's motion "and on her own terms and constitutes a valid and binding contract between the Parties and is not subject to change by the courts." That the decree was not based on any stated sum of money earned by defendant at the time it was entered "and that even if there was a change in circumstance, it cannot affect the said Decree legally." It was stipulated by the parties that at the time the decree was entered in 1937, plaintiff was receiving a salary of \$150 a month and that since May, 1940, he was receiving a salary of \$185 a month.

The court heard the matter on the petition, answer and stipulation, entered an order requiring plaintiff to pay \$31 a month, and defendant appeals.

Defendant contends the court was without jurisdiction to modify the decree; that "Section 18 of the Divorce Act does not enlarge the general equity powers of the Court, but it is the settled construction of said Section that it authorizes the change of a decree for alimony based only upon a changed condition or betterment of property qualifications after the decree to meet additional needs of one entitled to alimony arising after the decree. The burden is, of course, on the party seeking a change or modification of the decree, and it must be proven that her needs are greater and that the other party is in a position to meet the increased needs."

It is further contended by defendant that the alimony required to be paid by the decree "were amounts agreed on by the parties themselves *** and approved by the Court and constituted a binding contract between them." And further, even if the court had

Defendant filed a motion to strike the petition on the ground that "the decree entered *** was a consent decree and constituted a contract between the parties, and is binding on both of them permanently unless said Plaintiff remarries," and that the two children living with Plaintiff were self-supporting and paid room and board to their mother. The motion was overruled and defendant filed his answer in which he averred the decree of divorce was entered on Plaintiff's motion "and on her own terms and constituted a valid and binding contract between the parties and is not subject to change by the court." That the decree was not based on any stated sum of money earned by defendant at the time it was entered "and that even if there was a change in circumstances, it cannot affect the said Decree legally." It was stipulated by the parties that at the time the decree was entered in 1937, Plaintiff was receiving a salary of \$180 a month and that since 1940, he was receiving a salary of \$185 a month.

The court heard the matter on the petition, answer and stipulation, entered an order requiring Plaintiff to pay \$21 a month and defendant appeals.

Defendant contends the court was without jurisdiction to modify the decree; that "Section 18 of the Divorce Act does not enlarge the general equity power of the Court, but it is the settlement of said Section that it authorizes the change of a decree for alimony based only upon a changed condition or betterment of property qualification after the decree to meet additional needs of one entitled to alimony arising after the decree. The burden is, of course, on the party seeking a change or modification of the decree, and it must be proven that her needs are greater and that the other party is in a position to meet the increased needs."

It is further contended by defendant that the alimony was required to be paid by the decree "were amounts agreed on by the parties themselves *** and approved by the Court and constituted a binding contract between them." And further, even if the court had

jurisdiction to modify the decree it had no right to do so without hearing evidence as to the present financial condition of the parties. We think the contentions cannot be sustained. Adler v. Adler, 373 Ill. 361. In that case the court said: "Husband and wife, parties to a divorce action, may, as an act entirely separate and apart from such action, contract in respect to her future support. When they agree to and do incorporate the contract in the decree of divorce as an adequate provision for alimony, the contract becomes merged in the decree. Herrick v. Herrick, 319 Ill. 146.

**** At the time of the execution of the trust indentures and agreements and the entry of the decree of December 2, section 18 of the Divorce act expressly authorized a modification in the allowance of alimony under proper circumstances. The action of the parties, incorporating the indentures and agreements into that decree, must be deemed to have been made in view of that statute, and such statute, by implication, became a part of the decree. ***

"Respondent urged that because of the statement in the decree providing her remarriage should not be a cause for modification of the consent decree, the court was deprived of power to subsequently modify it. Grounds for divorce, payment of alimony and modification of the divorce decrees are regulated by statute. A court, when dealing with such matters, is exercising powers granted by the legislature and cannot, by incorporating such a provision in its decree, divest itself of the power to modify contrary to the legislative will."

Under the allegations of plaintiff's verified petition which were not denied by defendant in his answer, it appears that plaintiff was unable to live on the \$25 a month which defendant was then paying under the terms of the decree. She was unable to do the work of practical nursing from which she had theretofore received some compensation; defendant's salary had been increased from \$150 to \$185 a month. In these circumstances we think the modification

jurisdiction to modify the decree it had no right to do so without hearing evidence as to the present financial condition of the parties. We think the contention cannot be sustained. Adler v. Adler, 373 Ill. 361. In that case the court said: "Husband and wife parties to a divorce action, may, as an act entirely separate and apart from such action, contract in respect to her future support. When they agree to and do incorporate the contract in the decree of divorce as an adequate provision for alimony, the contract becomes merged in the decree. Henrich v. Henrich, 319 Ill. 148.

*** At the time of the execution of the first indentures and agreements and the entry of the decree of December 18 of the Divorce act expressly authorized a modification in the allowance of alimony under proper circumstances. The action of the parties, incorporating the indentures and agreements into that decree, must be deemed to have been made in view of that statute, and such statute, by implication, became a part of the decree. ***

"Respondent urged that because of the statement in the decree providing her remaining should not be a cause for modification of the consent decree, the court was deprived of power to subsequently modify it. Grounds for divorce, payment of alimony and modification of the divorce decrees are regulated by statute. A court, when dealing with such matters, is exercising powers granted by the legislature and cannot, by incorporating such a provision in its decree, divest itself of the power to modify contrary to the legislative will."

Under the allegations of Plaintiff's verified petition which were not denied by defendant in his answer, it appears that Plaintiff was unable to live on the \$25 a month which defendant was then paying under the terms of the decree. She was unable to do the work of practical nursing from which she had theretofore received some compensation; defendant's salary had been increased from \$150 to \$185 a month. In these circumstances we think the modification

-4-

made by the court was warranted.

The order of the Circuit court of Cook county appealed from is affirmed.

ORDER AFFIRMED.

Matchett, J., and McSurely, J. concur.

-4-

made by the court was warranted.

The order of the circuit court of Cook county appealed

from is affirmed.

ORDER AFFIRMED.

Katchett, J., and McGraw, J. concur.

41634

GEORGE E. CARLSON and FLORENCE H. CARLSON,

Appellants,

v.

CHICAGO TITLE & TRUST COMPANY, as Trustee, et al.,

Appellees.

310 L.A. 390²

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

February 10, 1938, plaintiffs filed their complaint in chancery in which they alleged that in 1925, they were the owners in fee of an undivided one-half interest in certain real estate located in Chicago and that Fritz Anderson and his wife owned the other one-half; that in March, 1925, the owners executed a trust deed to secure a bond issue of \$120,000, the proceeds of which were used to build a 31-apartment building on the property. The bonds matured serially, the last becoming due March 16, 1932; all payments, principal and interest which became due prior to March 16, 1930, were paid in full but default was made in payments of bonds maturing in March, 1931. Plaintiffs and the Andersons owned other real estate in common and transfers of such property were made so that plaintiffs became the sole owners of the property in question.

The record discloses that plaintiffs April 27, 1931, conveyed the property by warranty deed to John Swanson and wife, the parents of Mrs. Carlson, and the Swansons conveyed the property by quitclaim deed February 23, 1932, to Edna Carlson, who in turn executed a quitclaim deed conveying the premises to Harry G. Zimmermann April 22, 1932. December 15, 1932, Zimmermann conveyed the property in trust to the Chicago Title & Trust Company. On the same day the Chicago Title & Trust Company executed a trust deed to secure an indebtedness of \$10,000 to the First Union Trust & Savings Bank.

March, 1931, when default was made in the payment of the remaining bonds aggregating \$92,880, a plan of reorganization was

GEORGE E. CARLSON and FLORENCE H. CARLSON,

Appellants,

CHICAGO TITLE & TRUST COMPANY, as Trustee, of and for the

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

February 10, 1938, plaintiffs filed their complaint in

chancery in which they alleged that in 1928, they were the owners in fee of an undivided one-half interest in certain real estate located in Chicago and that Fritz Anderson and his wife owned the other one-half; that in March, 1925, the owners executed a trust deed to

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Zimmermann April 22, 1932. December 15, 1932, Zimmermann conveyed the property in trust to the Chicago Title & Trust Company. On the same day the Chicago Title & Trust Company executed a trust deed to secure an indebtedness of \$10,000 to the First Union Trust & Savings Bank.

March, 1931, when default was made in the payment of the remaining bonds aggregating \$22,880, a plan of reorganization was

contemplated and June 22, 1931, a deposit agreement was drawn up which, among other things, called for the deposit of the bonds with a committee and afterward all the bonds except one for \$1000 were deposited with the committee. At the time a letter was prepared by the committee and sent to the bondholders outlining the proposed plan in which it was stated, "On July 25, 1931, this Committee requested all holders of outstanding bonds to deposit same with the Depositary, Chicago Title & Trust Company, and pursuant to that request a very large majority of these outstanding bonds are now on deposit. We are, therefore, in a position to reorganize this property without the delay and expense of foreclosure, if the bondholders accept the plan below outlined. No foreclosure suit has been started, which has meant a great saving to the bondholders.

"The owner of the property, in order to avoid a foreclosure, has consented to turn over his equity to the Committee on terms which we think reasonable." Then follows an explanation of the proposed plan in which it was stated the title to the property had been placed in the Chicago Title & Trust Co., as trustee, and the management of the property was to be directed by three trust managers with the entire beneficial ownership in the income and proceeds from the property, except as stated in the next paragraph, in the present depositing bondholders "to be represented by certificates of interest to such bondholders in proportion and of the face value of their present holdings." The next paragraph provides: "The only interest given to the present owners of the equity, is the right, if they are able and see fit to exercise it, to purchase within two years, all of the preferred certificates of interest at the present value of the bonds. If at the end of such time, any preferred certificates of interest are outstanding, the owner will have an additional three years time in which to purchase all the preferred certificates of interest then outstanding at their par value, but only in case (during said three year period) no sale of the property has been made before the owners of the equity offer to so purchase.

contemplated and June 28, 1931, a deposit agreement was drawn up which, among other things, called for the deposit of the bonds with a committee and afterward all the bonds except one for \$1000 were deposited with the committee. At the time a letter was prepared by the committee and sent to the bondholders outlining the proposed plan in which it was stated, "On July 3, 1931, this Committee requested all holders of outstanding bonds to deposit same with the Depositary, Chicago Title & Trust Company, and pursuant to that request a very large majority of these outstanding bonds are now on deposit. We are, therefore, in a position to reorganize this property without the delay and expense of foreclosure, if the bondholders accept the plan below outlined. No foreclosure suit has been started, which has meant a great saving to the bondholders.

"The owner of the property, in order to avoid a foreclosure, has consented to turn over his equity to the Committee on terms which we think reasonable." Then follows an explanation of the proposed plan in which it was stated the title to the property had been placed in the Chicago Title & Trust Co., as trustee, and the management of the property was to be directed by three trust managers with the entire beneficial ownership in the income and proceeds from the property, except as stated in the next paragraph, in the present depositing bondholders "to be represented by certificates of interest to such bondholders in proportion and of the face value of their present holdings." The next paragraph provided: "The only interest given to the present owners of the equity, is the right, if they are able and see fit to exercise it, to purchase within two years, all of the preferred certificates of interest at the present value of the bonds. If at the end of such time, any preferred certificates of interest are outstanding, the owner will have an additional three years time in which to purchase all the preferred certificates of interest then outstanding at their face value, but only in case (during said three year period) no sale of the property has been made before the owners of the equity offer to so purchase.

"The trust managers are authorized to make a sale of the property at any time after two years, after notifying the then preferred certificate holders of the terms of the proposed sale, *** If at the end of five years the property has not been sold or the owners have not taken up all preferred certificates, the owner's interest can be entirely cut off by the payment to him of the sum of \$500. The owner's right will be evidenced by a common or subordinate certificate of interest issued to him." The letter further continued that to consummate the plan of reorganization and to pay back taxes and other expenses it was estimated that \$10,000 would cover such expenses, which amount was to be raised by a new mortgage on the property.

Mr. Carlson, one of the plaintiffs, examined the proposed reorganization plan as set forth in the printed letter to the bondholders and in a letter to the Bondholders' Protective Committee he said: "Recently we conveyed the title to the property *** located at 7007-7013 Ridge Boulevard, Chicago, Illinois, to a nominee for your Committee as a preliminary act of a proposed reorganization.

"The letter offering to the bondholders the plan of reorganization, copy of which is herewith attached, is now ready to be mailed.

"The terms of this letter are in accordance with our understanding and have our full approval."

Afterward the reorganization plan was put into effect December 15, 1932, and title to the premises was conveyed by Zimmermann to the Chicago Title & Trust Company, as trustee, under liquidating trust #29983, preferred certificates were issued to the depositing bondholders and common certificates of beneficial interest were to be issued to plaintiff George E. Carlson, or his nominee. Apparently the latter were never issued to Carlson. Afterward the three managers of which plaintiff Mr. Carlson was one, operated the property through a real estate firm. A new trust deed to secure the payment of \$10,000 borrowed on the property to pay taxes and the expenses of reorganization was executed and recorded

"The trust managers are authorized to make a sale of the property at any time after two years, after notifying the then preferred certificate holders of the terms of the proposed sale, *** If at the end of five years the property has not been sold or the owners have not taken up all preferred certificates, the owner's interest can be entirely cut off by the payment to him of the sum of \$500. The owner's right will be evidenced by a common or subordinate certificate of interest issued to him." The latter further continued that to consummate the plan of reorganization and to pay back taxes and other expenses it was estimated that \$10,000 would cover such expenses, which amount was to be raised by a new mortgage on the property.

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and the trust deed originally securing the \$120,000 loan, of which \$92,880 remained due, was released, the bonds canceled and some time later tendered to Mr. Carlson.

During the time plaintiffs Mr. and Mrs. Carlson occupied an apartment in the building, and on a number of occasions Mrs. Carlson showed prospective tenants apartments in the building and knew the real estate agents were operating the building. On a number of occasions the question of the Carlsons paying rent for the apartment occupied by them was taken up but the matter was put off from time to time and finally February, 1938, an action of forcible detainer was brought in the Municipal court of Chicago to obtain possession of the apartment. About that time plaintiffs filed their complaint in the instant case asking that the deed from Edna Carlson to Harry G. Zimmermann be decreed to have been given as additional security for the payment of the indebtedness secured by the trust deed of March 16, 1925; that the Chicago Title & Trust Company, as trustee under liquidation trust #29983, be required to reconvey the premises to plaintiffs; that an accounting be had of the amount due from plaintiffs on the indebtedness and on the rents collected by the trustee; that plaintiffs be given the right of redemption and in the event they were unable to pay the amount due and owing to the bondholders the court order defendants to institute a suit to foreclose the lien of the trust deed of 1925; that plaintiffs be given the right of redemption from such decree and that the prosecution of the forcible detainer suit be enjoined.

The case was referred to a master in chancery who took the evidence, made up his report and recommended the suit be dismissed for want of equity. A decree was entered in accordance with the recommendations of the master and plaintiffs appealed to the Supreme court. Upon consideration by our Supreme court the cause was transferred here, the court holding no freehold was involved. Carlson v. Chicago Title & Trust Co., et al., 375 Ill. 125.

In the complaint plaintiffs charged some of defendants, or

and the trust deed originally securing the \$150,000 loan, of which \$92,880 remained due, was released, the bonds canceled and some time later tendered to Mr. Carlson.

During the time plaintiffs Mr. and Mrs. Carlson occupied an apartment in the building, and on a number of occasions Mrs. Carlson showed prospective tenants apartments in the building and knew the real estate agents were operating the building. On a number of occasions the question of the Carlsons paying rent for the apartment occupied by them was taken up but the matter was put off from time to time and finally February, 1938, an action of forcible detainer was brought in the Municipal Court of Chicago to obtain possession of the apartment. About that time plaintiffs filed their complaint in the instant case asking that the deed from Edna Carlson to Harry G. Zimmermann be decreed to have been given as additional security for the payment of the indebtedness secured by the trust deed of March 16, 1925; that the Chicago Title & Trust Company, as trustee under liquidation trust #39883, be required to reconvey the premises to plaintiffs; that an accounting be had of the amount due from plaintiffs on the indebtedness and on the rents collected by the trustee; that plaintiffs be given the right of redemption and in the event they were unable to pay the amount due and owing to the bondholders the court order defendants to institute a suit to foreclose the lien of the trust deed of 1925; that plaintiffs be given the right of redemption from such decree and that the prosecution of the forcible detainer suit be enjoined.

The case was referred to a master in chancery who took the evidence, made up his report and recommended the suit be dismissed for want of equity. A decree was entered in accordance with the recommendations of the master and plaintiffs appealed to the Supreme Court. Upon consideration by our Supreme Court the cause was transferred here, the Court holding no threshold was involved.

Carlson v. Chicago Title & Trust Co., et al., 375 Ill. 125.

In the complaint plaintiffs charged some of defendants, or

their representatives, fraudulently caused the property to be transferred by plaintiffs and the other parties, as above stated, and fraudulently induced Mr. Carlson to sign the letter approving the plan of reorganization hereinbefore referred to.

January 13, 1938, the Chicago Title & Trust Company, trustee, wrote Mr. Carlson in reference to the common units of beneficial interest held by him under the trust agreement of November 15, 1932, stating that the five-year period mentioned in the trust agreement had elapsed and that it had \$500 which it would pay him for the common units. Apparently Mr. Carlson would not accept the \$500 and the litigation above mentioned was instituted shortly thereafter.

There is considerable evidence in the record which is analyzed and discussed by plaintiffs' counsel, all to the point that the several conveyances of the property were made on the theory that plaintiffs were still the owners of the equity and that Mrs. Carlson never signed any papers; that neither of plaintiffs knew defendants were claiming to own the property until about the time of the bringing of the forcible detainer suit in the Municipal court.

The evidence shows Mr. and Mrs. Carlson were experienced in dealing in real estate; that they owned several pieces of property on which they had built and made loans and understood such matters as those involved in the instant case. In this connection counsel for plaintiffs in their brief in stating the facts say:

"George E. Carlson and his wife, Florence H. Carlson, were married in the fall of 1919. She had taught music and contributed One Thousand Five Hundred Dollars (\$1,500.00) and he Seven Hundred Dollars (\$700.00) to a sash and door jobbing business which he had started after leaving army service in June, 1919, following the Armistice. This business prospered with an income of Four Thousand Dollars (\$4,000.00) or Five Thousand Dollars (\$5,000.00) the first year, and it grew steadily until it reached Twenty-five Thousand

their representatives, fraudulently caused the property to be transferred by plaintiff and the other parties, as above stated, and fraudulently induced Mr. Carlson to sign the letter approving the plan of reorganization heretofore referred to.

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There is considerable evidence in the record which is analyzed and discussed by plaintiff's counsel, all to the point that the several conveyances of the property were made on the theory that plaintiff were still the owners of the equity and that Mrs. Carlson never signed any papers; that neither of plaintiff knew defendants were claiming to own the property until about the time of the bringing of the forcible detainer suit in the Municipal Court.

The evidence shows Mr. and Mrs. Carlson were experienced in dealing in real estate; that they owned several pieces of property on which they had built and made loans and understood such matters as those involved in the instant case. In this connection counsel for plaintiff in their brief in stating the facts say:

"George E. Carlson and his wife, Florence H. Carlson, were married in the fall of 1918. She had taught music and contributed One Thousand Five Hundred Dollars (\$1,500.00) and he Seven Hundred Dollars (\$700.00) to a cash and door knocking business which he had started after leaving army service in June, 1918. Following the Antislavery. This business prospered with an income of Four Thousand Dollars (\$4,000.00) or Five Thousand Dollars (\$5,000.00) the first year, and it grew steadily until it reached twenty-five thousand

Dollars (\$25,000.00) a year. He and his wife had accumulated One Hundred Thousand Dollars (\$100,000.00) in 1924. He started in with his wife in real estate operations, building apartments, the first being in 1922. They built for investment seven or eight buildings. These properties were owned by the plaintiffs and title was taken by them in joint tenancy. They executed trust deed and notes on all the properties they built except the Homestead Hotel."

The master found the title passed as indicated by the deeds; that Mr. and Mrs. Carlson had no interest in the real estate except as owners of the common certificates of beneficial interest issued under the plan of reorganization; that what had been done under the plan of reorganization was approved by Mr. Carlson; that the original trust deed of 1925, securing the bond issue, had been released of record and the bonds canceled; that this was known to plaintiffs; that for more than five years no steps were taken to foreclose the lien of the trust deed; that plaintiffs were guilty of laches and estopped from asserting any claim to the property. The finding was approved by the chancellor and upon a consideration of the record we are of opinion the report of the master and the decree of the chancellor were warranted by the evidence.

The decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

Matchett, J., and McSurely, J. concur.

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affirmed.

JOHN A. TILMAN,

Matchett, J., and McNulty, J. concur.

41666

310 I.A. 391

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

FRANK STOLTZ, doing business as
STOLTZ MOTOR DISCOUNT COMPANY,
Plaintiff in Error.

WRIT OF ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

February 6, 1940, an information by leave of court was filed; it was made and sworn to by W. W. Heise "as manager of the Sun Finance Company, not incorporated, M. I. Brain, Owner" in which it was charged that Frank Stoltz, doing business as Stoltz Motor Discount, on July 22, 1939, "Did unlawfully and wilfully and fraudulently with the intent to cheat and defraud by means of false pretenses and misrepresentations the Sun Finance Company, M. I. Brain, Owner"; that Stoltz sold a second-hand Ford car under a conditional sales contract to Paul Civick for \$190 "with a cash down payment of \$40 the balance to be financed by the Sun Finance Company," whereas in truth and in fact the car was sold for \$145 with a down payment of \$2; that the false representations were made with intent to cheat and defraud the "Sun Finance Co., of the Sum of \$38 and plus its finance carrying charge."

February 9, Stoltz was arrested, brought into court and an order was entered postponing the trial to February 16. On a later date another order was entered setting the case for jury trial March 1. On the latter date the case was called for trial and by leave of court the People filed instantaner an amended information which was also made and sworn to by W. W. Heise, in which it was charged that Frank Stoltz, July 21, 1939, had falsely and designedly represented to Heise who was acting manager of I. M. Brain, doing business as Sun Finance Company, that he had sold a second-hand Ford car for \$190 to Paul Civick under a conditional sales contract for \$190 with a down payment of \$40, the balance to

PEOPLE OF THE STATE OF ILLINOIS
Defendant in Error,

v.

FRANK STOLTZ, doing business as
STOLTZ MOTOR DISCOUNT COMPANY,
Plaintiff in Error.

STATE OF ILLINOIS TO
NORTH BRANCH COURT
OF CHICAGO.

MR. PRESIDING JUSTICE (LOCAL DELIVER) TO THE CLERK OF THE COURT,

February 8, 1947, an information by leave of court was filed; it was made and sworn to by A. W. Heise "as manager of the Sun Finance Company, not incorporated, M. I. Brain, owner" in which it was charged that Frank Stoltz, doing business as Stoltz Motor Discount, on July 22, 1938, "did unlawfully and wilfully and fraudulently with the intent to cheat and defraud by means of false promises and misrepresentations the Sun Finance Company, M. I. Brain, Owner"; that Stoltz sold a second-hand Ford car under a conditional sales contract to Paul Davick for \$190 "with a down payment of \$40 the balance to be financed by the Sun Finance Company," as in truth and in fact the car was sold for \$145 with a down payment of \$2; that the false representations were made with intent to cheat and defraud the "Sun Finance Co., of the sum of \$88 and plus the finance carrying charge."

February 9, Stoltz was arrested, brought into court and an order was entered postponing the trial to February 18. On a later date another order was entered setting the case for July trial March 1. On the latter date the case was called for trial and by leave of court the People filed instanten an amended information which was also made and sworn to by A. W. Heise, in which it was charged that Frank Stoltz, July 22, 1938, "did unlawfully and fraudulently with the intent to cheat and defraud by means of false promises and misrepresentations the Sun Finance Company, M. I. Brain, doing business as Sun Finance Company, the said sold a second-hand Ford car for \$190 to Paul Davick under a conditional sales contract for \$190 with a down payment of \$40, the balance to

be financed by the Sun Finance Company and that, relying upon the representations, Heise, for the Sun Finance Company, agreed to finance the deal and pay over and deliver to Stoltz \$157.50 "the personal goods, money and property of" Brain, being the unpaid balance "and a reserve commission paid to used car dealers for finance business forwarded"; that the "sale price of the car was \$145 & that only a \$2 down payment was made by Paul Civick"; that the misrepresentations were made by Stoltz for the purpose of defrauding the finance company "in violation of Paragraph 253, Chapter 38, Illinois Revised Statutes, 1937."

A jury was waived, the cause submitted to the court and after hearing the evidence the court found defendant guilty as charged, sentenced him to three months in the House of Correction and a fine of \$300 was imposed. Defendant prosecutes this writ of error.

Defendant contends the amended information alleged defendant, through false representations, had received \$157.50 from the Sun Finance Company, while the proof showed it was a check for that amount and therefore there was a failure to prove the allegation of the information. In reply to this contention counsel for the People say: "An allegation that defendant obtained money by false pretenses does not vary from proof that he obtained a check or a credit or a warrant upon which money was received or checked out," and in support of this cite sixteen cases from sixteen states of the Union but no Illinois case is cited. Counsel further say: "Questions of variances are regarded as material in criminal cases when they mislead the defendant in making his defense and expose him to the danger of being again put in jeopardy for the same offense but cannot be first raised in a reviewing court." Continuing counsel say: "An examination of all of the Illinois decisions, both Appellate and Supreme, fails to disclose one case wherein the identical proposition was ever passed on in a false pretenses case." Counsel then discuss the authorities cited from other states which sustain the People's contention.

be financed by the Sun Finance Company and that, relying upon the representations, Halse, for the Sun Finance Company, agreed to finance the deal and pay over and deliver to Stolitz \$187.50 "the personal goods, money and property of" Brain, being the unpaid balance "and a reserve commission paid to used car dealers for finance business forwarded"; that the "sale price of the car was \$145 & that only a \$2 down payment was made by Paul Givich"; that the misrepresentations were made by Stolitz for the purpose of defrauding the finance company "in violation of Paragraph 253, Chapter 38, Illinois Revised Statutes, 1937."

A jury was waived, the cause submitted to the court and after hearing the evidence the court found defendant guilty as charged, sentenced him to three months in the house of correction and a fine of \$300 was imposed. Defendant prosecutes this writ of error.

Defendant contends the amended information alleged defendant, through false representations, had received \$187.50 from the Sun Finance Company, while the proof showed it was a check for that amount and therefore there was a failure to prove the allegation of the information. In reply to this contention counsel for the People say: "An allegation that defendant obtained money by false pretenses does not vary from proof that he obtained a check or a credit or a warrant upon which money was received or cashed out," and in support of this the sixteen cases from sixteen states of the Union but no Illinois case is cited. Counsel further say: "Questions of variance are regarded as material in criminal cases when they mislead the defendant in making his defense and expose him to the danger of being again put in jeopardy for the same offense but cannot be first raised in a reviewing court." Continuing counsel say: "An examination of all of the Illinois decisions, both Appellate and Supreme, fails to disclose one case wherein the identical proposition was ever passed on in a false pretenses case." Counsel then discuss the authorities cited from other states which sustain the People's contention.

In People v. Cronkite, 266 Ill. 438, where defendant was convicted in the Criminal court of Cook county upon an indictment charging him with the confidence game, it was held the charge that defendant obtained money by means of the confidence game was not sustained by proof that what he obtained from the victim was a check; that this was true though he afterward cashed the check at a bank. The court there said: "The proof is, that what plaintiff in error obtained was a check, which was afterwards paid. The question, therefore, is whether an indictment charging that plaintiff in error obtained money is sustained by proof that he obtained a check. In Lory v. People, 229 Ill. 268, this court held that under an indictment charging that the defendant feloniously obtained from a certain person '\$400 of good and lawful money of the United States' is not sustained by proof that the defendant obtained a check for \$300, and the ground of the decision was, that proof of obtaining a check is fatally variant from the charge of obtaining money. Defendant in error seeks to distinguish that case from the one at bar because in the Lory case it did not appear that the prisoner had obtained the money upon the check, but that circumstance cannot affect the question at issue. Proof that the check was afterwards cashed does not sustain the allegation that he obtained the money from Juergensen. He obtained money, it is true, from the bank, but what he obtained from Juergensen was a check, and nothing else. The Lory case was followed in People v. Warfield, 261 Ill. 293. These cases, and authorities cited therein, seem to be conclusive of this question." We think that case is in point although defendant was there charged with obtaining money by means of the confidence game, while in the instant case the charge is that he obtained money by false pretenses.

Section 96, par. 253, ch. 38, Ill. Rev. Stats. upon which the information in the instant case was based provides: "Whoever, with intent to cheat or defraud another, *** by any false pretense, *** obtains from any person any money, personal property or other valuable thing," shall be fined and imprisoned, etc., while \$98,

valuable thing," shall be fined and imprisoned, etc., while \$38, *** obtains from any person any money, personal property or other with intent to cheat or defraud another, *** by any false pretense, the information in the instant case the basic provision: "Whoever, Section 96, par. 85, ch. 92, Ill. Rev. Stat., from which false pretenses. while in the instant case the charge is that he obtained money by there charged with obtaining money by means of the confidence game, question." We think that case is in point although defendant was and authorities cited therein, seem to be conclusive of this case was followed in People v. Garfield, 261 Ill. 202. There cases, he obtained from Jurgensen was a check, and nothing else. The Jory Jurgensen. He obtained money, it is true, from the bank, but what not sustain the allegation that he obtained the money from question at issue. Proof that the check was afterwards cashed does the money upon the check, but that circumstance cannot affect the in the Jory case it did not appear that the prisoner had obtained in error seeks to distinguish that case from the one at bar because is fatally variant from the charge of obtaining money. Defendant and the ground of the decision was, that proof of obtaining a check sustained by proof that the defendant obtained a check for \$300, person \$400 of good and lawful money of the United States; is not ment charging that the defendant feloniously obtained from a certain Jory v. People, 239 Ill. 283, this court held that under an indictment sustained by proof that he obtained a check. In therefore, is whether an indictment charging that plaintiff in error obtained was a check, which was afterwards paid. The question, The court there said: "The proof is, that what plaintiff in error that this was true though he afterwards cashed the check at a bank. sustained by proof that what he obtained from the victim was a check defendant obtained money by means of the confidence game was not charging him with the confidence game, it was held the charge that convicted in the Criminal Court of Cook County upon an indictment In People v. Gronkita, 268 Ill. 438, where defendant was

par. 256, ch. 38 provides: "Every person who shall obtain *** from any other person *** any money, property or credit by means or by use of any false *** device commonly called the confidence game shall be imprisoned," etc.

We think we ought also to say that the court erred, as defendant contends, in permitting evidence of other claimed unrelated offenses charged against defendant to be introduced. From the record it appears there were other criminal informations filed and pending against defendant growing out of similar transactions in selling and financing second-hand automobiles.

Counsel for the People say the evidence of other similar acts claimed to have been committed by the accused was properly admitted. They say: "Where a specific intent is an essential element of a crime evidence of similar acts committed by the accused at or about the same time as the act charged, is relevant and competent to show such intent." But we think this rule is not applicable to the facts in the instant case. The evidence of the People tended to show defendant falsely represented to a representative of the Sun Finance Company that he had sold the second-hand Ford car for \$190 and had received a down payment of \$40, when the fact was, he had sold the car for \$145 with a down payment of but \$2. If the court believed the evidence offered by plaintiff, the intent of defendant would logically follow and evidence of other claimed similar offenses was wholly unnecessary. The only purpose served was to prejudice defendant and to confuse the issues. Defendant denied he had made any misrepresentations. His testimony was to the effect he sold the second-hand Ford car for \$190 to Civick and took in part payment a Plymouth automobile which he had theretofore sold Civick and for which he allowed \$40 on the purchase price.

In People v. Mangano, 375 Ill. 72, where defendant was found guilty of murder and the death penalty imposed, the judgment was reversed and the cause remanded for the admission of evidence of other crimes committed by the accused. The court there said:

par. 256, ch. 38 provides: "Every person who shall obtain *** from any other person *** any money, property or credit by means or by use of any false *** device commonly called the confidence game shall be imprisoned," etc.

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In People v. Marzano, 375 Ill. 72, where defendant was found guilty of murder and the death penalty imposed, the judgment was reversed and the cause remanded for the admission of evidence of other crimes committed by the accused. The court there said:

"Evidence which discloses that the accused committed crimes other than the one charged is admissible only when it tends to establish the crime for which he is being tried. Before such evidence is admissible it must meet the same test as to relevancy and materiality to the issues as other evidence. (People v. Jennings, 252 Ill. 534; Farris v. People, 129 id. 521.) It has been held that the evidence of other crimes is admissible if it has a tendency to identify the accused as the one who committed the crime charged, to show his presence at the scene of the crime when an alibi is interposed, to prove design, motive or knowledge where these matters are in issue or relevant." As stated, we think it obvious that if the court believed the People's evidence he would have no trouble in arriving at the intent of defendant and evidence of other offenses, we think, was inadmissible. The evidence was prejudicial although the case was tried before the court without a jury. People v. Reed, 287 Ill. 606.

The judgment of the Municipal court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, J., and McSurely, J. concur.

"Evidence which discloses that the accused committed crimes other than the one charged is admissible only when it tends to establish the crime for which he is being tried. Before such evidence is admissible it must meet the same test as to relevancy and materiality to the issues as other evidence. (People v. Jennings, 283 Ill. 584; People v. People, 139 Ill. 581.) It has been held that the evidence of other crimes is admissible if it has a tendency to identify the accused as the one who committed the crime charged, to show his presence at the scene of the crime when an alibi is interposed, to prove design, motive or knowledge where these matters are in issue or relevant." As stated, we think it obvious that if the court believed the People's evidence he would have no trouble in arriving at the intent of defendant and evidence of other offenses, we think, was inadmissible. The evidence was prejudicial although the case was tried before the court without a jury. People v. Reed, 287 Ill. 508.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERLED AND REMANDED.

Matchetti, J., and McLaughlin, J. concur.

41538

RENIE F. GOODMAN,

Appellee,

APPEAL FROM

v.

CIRCUIT COURT,

EDMUND K. JARECKI, as Judge of
The County Court of Cook County,
Appellant.

COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Renie F. Goodman filed a petition for mandamus in the Circuit court seeking to have the judge of the County court of Cook county expunge an order entered April 4, 1923, adjudging her insane; an answer was filed and the Circuit court, after hearing, found she had received no notice of the time and place of the inquest as to her sanity; that the order entered finding her insane was therefore void, and the writ of mandamus, as requested, was issued. From this order the judge of the County court (hereafter called defendant) appeals.

The record of the proceedings in the County court shows that April 4, 1923, an application was filed by Charles Goodman asserting that he believed Renie F. Goodman to be insane and asking that a warrant be issued for her to appear before the court for a hearing in accordance with the statute (Ill. Rev. Stats. 1939, ch. 85, §§3,4); that subpoena be issued for witnesses, returnable at such a time as may be fixed by the court. The County court indorsed this application, "Returnable on the 4th day of April, 1923, 3 o'clock p. m." No writ was issued but the record shows that on the same day she was brought into court in custody of the sheriff of Cook county, and on the same day commissioners were appointed to examine her mental condition, and an order was entered setting the hearing on the same day at 9 o'clock a. m. in the Psychopathic Hospital in Chicago, Cook county, Illinois.

The court also ordered that a copy of the notice of the hearing should be delivered to Renie F. Goodman on or before April 4, 1923. There is no record that such notice was delivered to her. The petition alleges notice of the trial was not given as the court

RENIE F. GOODMAN,

Appellee,

v.

EDMUND K. JARECKI, as Judge of
The County Court of Cook County,
Appellant.

MR. JUSTICE McSWEENEY DELIVERED THE OPINION OF THE COURT.

Renie F. Goodman filed a petition for mandamus in the Circuit court seeking to have the Judge of the County court of Cook County expunge an order entered April 4, 1935, adjudging her insane; an answer was filed and the Circuit court, after hearing, found she had received no notice of the time and place of the indictment as to her sanity; that the order entered finding her insane was therefore void and the writ of mandamus, as requested, was issued. From this order the Judge of the County court (hereafter called defendant) appeals. The record of the proceedings in the County court shows that April 4, 1935, an application was filed by Charles Goodman asserting that he believed Renie F. Goodman to be insane and asking that a warrant be issued for her to appear before the court for a hearing in accordance with the statute (Ill. Rev. Stats. 1933, ch. 85, § 83.4); that subpoena be issued for witnesses, returnable at such a time as may be fixed by the court. The County court ordered this application, "Returnable on the 4th day of April, 1935, 3 o'clock p. m." No writ was issued but the record shows that on the same day she was brought into court in custody of the sheriff of Cook County, and on the same day commission was appointed to examine her mental condition, and an order was entered setting the hearing on the same day at 3 o'clock a. m. in the Lakeside Hospital in Chicago, Cook County, Illinois. The court also ordered that a copy of the notice of the hearing should be delivered to Renie F. Goodman on or before April 4, 1935. There is no record that such notice was delivered to her. The petition alleges notice of the trial was not given as the court

ordered and this allegation is admitted in the answer.

The record further shows that on the same day the commissioners appointed by the court filed a report finding Renie F. Goodman was insane and recommending that she be sent to a hospital or asylum for the insane. The court followed the findings of the commissioners that she was insane and ordered that she be committed to the care and custody of Charles Goodman, who, it was asserted upon oral argument, is her husband.

Upon the hearing in the Circuit court it was stated the sole question was whether the order of the County court was void for lack of sufficient notice of the hearing to Renie Goodman.

Section 4 of chapter 85 (Statute on Lunatics) provides that a writ shall be directed to the sheriff or any constable or person having custody or charge of the person alleged to be insane, commanding such person to be brought before the court, unless the person alleged to be insane shall be brought before the court without a writ. As we have said, the record shows that Renie Goodman was brought before the court without a writ, hence a writ was unnecessary. That section also provides, with reference to the hearing of the issue of insanity, "and in no case shall such hearing take place until the person alleged to be insane shall have been notified as the court shall direct." The petitioner in the Circuit court argues that the record fails to show she received any copy of the notice of hearing as directed by the court. The Circuit court sustained this point and recited in its order that the County court had no jurisdiction over Renie F. Goodman for want of notice to her of the hearing to try the question of insanity as ordered by the County court. The Circuit court concluded that the judgment of the County court that she was insane was therefore void.

There is much discussion by respective counsel, with numerous citations, as to the difference between a collateral and a direct attack on a judgment, but in our view of the case it is unnecessary to discuss this as it is conceded that if the judgment order is void for want of jurisdiction of the person it is im-

ordered and this allegation is admitted in the answer.

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that a writ shall be directed to the sheriff or any constable or

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necessary. That section also provides, with reference to the hear-

ing of the issue of insanity, "and in no case shall such hearing

take place until the person alleged to be insane shall have been

notified as the court shall direct." The petition in the Circuit

court argues that the record fails to show she received any copy

of the notice of hearing as directed by the court. The Circuit court

sustained this point and ruled in its order that the County court

had no jurisdiction over Renie F. Goodman for want of notice to her

of the hearing to try the question of insanity as ordered by the

County court. The Circuit court concluded that the judgment of the

County court that she was insane was therefore void.

There is much discussion by respective counsel, with

numerous citations, as to the difference between a collateral and

a direct attack on a judgment, but in our view of the case it is

unnecessary to discuss this as it is conceded that if the judgment

order is void for want of jurisdiction of the person it is im-

material whether the attack on it is collateral or direct.

The record shows that the County court set the hearing at 9 o'clock a. m. on April 4, 1923, in the Psychopathic Hospital in the city of Chicago, and also ordered that a copy of this order "be delivered to said Renie F. Goodman on or before the 4th day of April, 1923." The record fails to show this order was obeyed. No copy of the order was ever delivered to petitioner as commanded by the County court. In the Circuit court and in this court it is admitted (specifically by defendant's answer) that she was not served with such notice.

A large number of cases state the general proposition that if no notice of an inquiry into the sanity of a person is given, an order adjudging such person insane is absolutely null and void. Eddy v. People ex rel. Eddy, 15 Ill. 386; Behrensmeyer v. Kreitz, 135 Ill. 591, 637; Haines, Admr. v. Gearlock, 184 Ill. 96, and many cases from other states.

Defendant argues that the Circuit court has no power to mandamus the County court with reference to the judgment entered by it; that the County court, in exercising jurisdiction in insanity matters, is a court of jurisdiction equal to that of the Circuit court. Mandamus proceedings to compel the expunging of a void order have been frequently used in this state. In People v. Smith, 275 Ill. 210, 215, the court held mandamus was the proper remedy to compel the expunging of a void order made by a court or judge without jurisdiction. See also People v. Weaver, 330 Ill. 643, 649, where it was said the contention that mandamus is not the proper remedy to secure the expunging of a void judgment is untenable. In People ex rel. Wineland v. Calhoon, 287 Ill. App. 273, a petition for mandamus was filed in the Circuit court to compel the judge of the County court to expunge a void order; it was argued the Circuit court had no jurisdiction to grant a writ of mandamus directed to the County court. The Appellate court did not sustain this argument but held the County court was without jurisdiction to enter the

order and that the void order may be expunged by mandamus from the Circuit court.

In the following cases the Circuit court has issued mandamus against the County court, which actions have been upheld: Graham v. People, 111 Ill. 253; Dowdall v. Hutchins, 263 Ill. App. 275; People v. Leech, 285 Ill. App. 19.

No case is cited holding that the Circuit court has no power to issue a mandamus writ against a judge of the County court. In People ex rel. Kocourek v. City of Chicago, 193 Ill. 507, in passing upon a petition for writ of mandamus the court said that under §12, art. 6 of the Constitution of 1870, the Circuit courts also have original jurisdiction in mandamus cases, and the original jurisdiction of the Supreme court in such cases is not exclusive but is concurrent with that of the Circuit court. It could hardly be argued that the Supreme court had no power to issue the writ of mandamus to the County court, and it follows that the Circuit court has equal power.

Application was made in the present case to the County court to expunge its judgment of April 4, 1923, which application was refused. As there was no appeal from an order of the County court adjudging one to be insane (People v. Gilbert, 115 Ill. 59), and as habeas corpus proceedings were doubtful (as petitioner was in the custody of her husband) no valid reason is presented against mandamus proceedings in the Circuit court to expunge a judgment void from the beginning.

Cases appearing in the briefs for defendant are concerned with situations and conditions different from those presented in the instant case. They involve questions of the propriety of the proceedings in the court sought to be mandamus, that is, whether there was reversible error. In no case cited is it held that mandamus cannot be ordered by another court to expunge an order or judgment entered against one who has not received notice or served with process. Such an order is void.

order and that the void order may be expunged, mandamus from the Circuit court.

In the following cases the Circuit court has issued mandamus against the County court, which actions have been upheld: Graham v. People, 111 Ill. 388; Dowdell v. People, 383 Ill. App. 275; People v. Leech, 383 Ill. App. 17.

No case is cited holding that the Circuit court has no power to issue a mandamus writ against a Judge of the County court. In People ex rel. Koonce v. City of Chicago, 106 Ill. 507, in passing upon a petition for writ of mandamus the court said that under §12, art. 6 of the Constitution of 1870, the Circuit courts also have original jurisdiction in mandamus cases, and the original jurisdiction of the Supreme court in such cases is not exclusive but is concurrent with that of the Circuit court. It could hardly be argued that the Supreme court had no power to issue the writ of mandamus to the County court, and it follows that the Circuit court has equal power.

Application was made in the present case to the County court to expunge the judgment of April 4, 1930, which application was refused. As there was no appeal from an order of the County court adjudging one to be insane (People v. Elbert, 115 Ill. 30), and as habeas corpus proceedings were doubtful (an petitioner was in the custody of her husband) no valid reason is presented against mandamus proceedings in the Circuit court to expunge a judgment void from the beginning.

Cases appearing in the briefs for defendant are so concerned with situations and conditions different from those presented in the instant case. They involve questions of the propriety of the proceedings in the court sought to be mandamus, that is, whether there was reversible error. In no case cited is it held that mandamus cannot be ordered by another court to expunge an order or judgment entered against one who has not received notice or served with process. Such an order is void.

There are special reasons why, in insanity proceedings, the record must show affirmatively the party was served with notice of the hearing as ordered by the court. These reasons are stated in Supreme Council R. A. v. Nicholson, 104 Md. 472, 479; Evans v. Johnson, 39 W. Va. 299, and other cases.

We are not unmindful of the fact that Charles Goodman, counsel for petitioner here, is also the counsel who instituted the lunacy inquest and approved of those proceedings. In a sense he might be held responsible for the failure to give notice. We also note that apparently the only persons interested in the present case are Charles Goodman and his wife Renie Goodman, the petitioner. Under such circumstances the request to expunge the judgment of insanity should be considered favorably and allowed if there is any reasonable legal basis for doing so.

We hold the Circuit court properly held that the failure to give petitioner notice in the County court proceeding of the hearing as to her sanity justified an order that the County court expunge its judgment. The order of the Circuit court awarding the writ is affirmed.

ORDER AFFIRMED.

O'Connor, P.J., and Matchett, J. concur.

There are special reasons why, in insanity proceedings, the record must show affirmatively the party was served with notice of the hearing as ordered by the court. These reasons are stated in Supreme Council R. A. v. Nicholson, 104 Md. 478, 479; Evans v. Johnson, 33 W. Va. 299, and other cases.

We are not unmindful of the fact that Charles Goodman, counsel for petitioner here, is also the counsel who instituted the insanity indictment and approved of those proceedings. In a sense he might be held responsible for the failure to give notice. We also note that apparently the only persons interested in the present case are Charles Goodman and his wife Fannie Goodman, the petitioner. Under such circumstances the request to expunge the judgment of insanity should be considered favorably and allowed if there is any reasonable legal basis for doing so.

We hold the circuit court properly held that the failure to give petitioner notice in the County court proceeding of the hearing as to her sanity justified an order that the County court expunge its judgment. The order of the circuit court awarding the writ is affirmed.

ORDER AFFIRMED.

O'Connor, P.J., and Metcalf, J. concur.

41598

MARIAN L. FOGELSON,

Appellant,

310 I.A. 392²

APPEAL FROM

v.

SAMUEL J. FOGELSON,

Appellee.

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

July 12, 1939, plaintiff obtained a decree of divorce charging defendant with cruelty; the decree provided for the custody of two minor children - John, aged 6-1/2 years and Richard, 4-1/2; apparently the provisions for the custody of the children were satisfactory to all parties. Plaintiff was also awarded \$100 a month toward the maintenance of the minor children.

January 5, 1940, defendant filed a petition asking for a modification of the provisions respecting the custody of the children; to this the plaintiff filed an answer and a counterclaim in which she asked, among other things, for an increase in the award of \$100 a month for the maintenance of the children; defendant filed an answer; the court heard evidence and made some changes with reference to the custody of the children and denied plaintiff's petition for an increased allowance; she appeals.

The decree of divorce provided that the custody of the children should be awarded to plaintiff during the school year, subject to the right of defendant to have the children each alternate week-end during the period; defendant also to have the privilege of seeing and visiting them at all other reasonable times. The order entered June 14, 1940, modified this provision by prohibiting defendant from visiting the minor children at any time thereafter at plaintiff's home except in case of their illness. There was evidence that on the occasions of the visits of defendant to the children in plaintiff's home there were tragic scenes and quarrels. Plaintiff is content with the modification and the defendant agrees to abide by this.

MARIAN L. FOGELSON,
 Appellant,
 v.
 SAMUEL J. FOGELSON,
 Appellee.
 SUPERIOR COURT,
 COOK COUNTY.
 APPEAL FROM

MR. JUSTICE McFARLAND DELIVERED THE OPINION OF THE COURT.

July 12, 1939, Plaintiff obtained a decree of divorce charging defendant with cruelty; the decree provided for the custody of two minor children - John, aged 8-1/2 years and Edward, 4-1/2; apparently the provisions for the custody of the children were satisfactory to all parties. Plaintiff was also awarded \$100 a month toward the maintenance of the minor children.

January 5, 1940, defendant filed a petition asking for a modification of the provisions respecting the custody of the children; to this the plaintiff filed an answer and a counterclaim in which she asked, among other things, for an increase in the award of \$100 a month for the maintenance of the children; defendant filed an answer; the court heard evidence and made some changes with reference to the custody of the children and denied plaintiff's petition for an increased allowance; she appealed.

The decree of divorce provided that the custody of the children should be awarded to plaintiff during the school year, subject to the right of defendant to have the children each alternate week-end during the period; defendant also to have the privilege of seeing and visiting them at all other reasonable times. The order entered June 14, 1940, modified the provision by permitting defendant from visiting the minor children at any time thereafter at plaintiff's home except in case of an illness. There was evidence that on the occasions of the visits of defendant to the children in plaintiff's home there were tragic scenes and quarrels. Plaintiff in contact with the modification and the defendant agrees to abide by this.

The crux of the controversy is the times which the modified order permitted defendant to have custody of the children. The original order provided that during the school year defendant should have the children in his custody each alternate week-end during said period. This was modified to permit defendant to have the children with him on Tuesdays from the hours of 3:30 p. m. to 7:30 p. m., and during the alternate weeks on Tuesdays and Fridays at the same hours. The order also provided that on these occasions plaintiff should deliver the children to the home of defendant, who should return them to plaintiff's home at the time specified.

The original order provided that defendant should have the custody of the children during the summer school vacation, subject to the right of the plaintiff to have their custody for a period of two weeks during such vacation - plaintiff to have the right of visitation while the children are with defendant. The modified order provided that so long as the children were attending the school of the University of Chicago plaintiff should have their custody for an additional period of three weeks during their summer vacation beyond the two weeks' period provided for in the original decree. It also provided that plaintiff could make no change from the school the children were then attending without the consent of defendant or of the court - in all other respects the decree of divorce of July 12, 1939, to remain in full force and effect, and, except as modified, the respective prayers of the petition of defendant and of the counter-petition of plaintiff were denied.

Plaintiff appealing asks that the order be reversed with directions that the unconditional custody of the children be granted to plaintiff, with provision that defendant may on alternate weeks have the children from the hour of 3:30 p. m. to 7:30 p. m. on one day of such week and on alternate weeks have the children from noon on Saturday until 7:30 p. m. on the following Sunday. Plaintiff also asks that the order be reversed with directions to change the award of \$100 a month for the maintenance of both

The crux of the controversy is the times which the modified order permitted defendant to have custody of the children. The original order provided that during the school year defendant should have the children in his custody each alternate week-end during said period. This was modified to permit defendant to have the children with him on Tuesdays from the hour of 8:30 p. m. to 7:30 p. m., and during the alternate weeks on Tuesdays and Fridays at the same hours. The order also provided that on these occasions plaintiff should deliver the children to the home of defendant, who should return them to plaintiff's home at the time specified.

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Plaintiff complains that the order be reversed with directions that the unconditional custody of the children be granted to plaintiff, with provision that defendant may on alternate weeks have the children from the hour of 8:30 p. m. to 7:30 p. m. on one day of each week and on alternate weeks have the children from noon on Saturday until 7:30 p. m. on the following Sunday.

Plaintiff also asks that the order be reversed with directions to change the award of \$100 a month for the maintenance of both

children to \$1200 per year for the maintenance of each of them.

The burden of plaintiff's argument is that while in the custody of defendant their minds are poisoned by him against her. A large amount of testimony is taken up with trivial incidents and many pert and sometimes impudent sayings of the small boys. Plaintiff seeks to draw the conclusion from these unhappy incidents that defendant has inspired their conduct, and especially has attempted to instill dislike in their minds towards plaintiff, their mother. We are of the opinion that this goes far from proof of the charges made that defendant is responsible for the conduct of the children. It is well known that boys of this age are given to saying things which have a tendency to shock their elders. Applicable to the record before us is the statement in Buehler v. Buehler, 373 Ill. 626, 630: "A great mass of evidentiary matter in the record goes to trivial matters occurring in almost every household regardless of station in life...."

Each party to the controversy makes charges against the other. The brief for plaintiff not only charges defendant with cruelly attempting to poison the minds of the children against their mother, but also that his calls upon the home to visit the children were prompted by "a vindictive desire to intrude upon and invade this peaceful household." On the other hand, the brief for defendant charges plaintiff with being spoiled through the indulgence of her father, a widower, and that she "is a domineering, wilful person." These charges are not wholly baseless. Both parties exhibit a tendency to dramatize trivial incidents and to magnify them far beyond what they deserve.

It is well settled that the interests of the children are to be primarily considered in these situations. People v. Wingate, 376 Ill. 244. The fact of the youthfulness of the children - about 7 and 5 years respectively, would require that the mother should have almost their constant custody if she is at all a fit person. The chancellor evidently carefully studied how the welfare of the

children to \$1200 per year for the maintenance of each of them.

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It is well settled that the interests of the children are to be primarily considered in these situations. Boyle v. Minnesota, 376 Ill. 244. The fact of the youthfulness of the children - about 7 and 8 years respectively, would require that the mother should have almost their constant custody if she is at all a fit person. The chancellor evidently carefully studied how the welfare of the

children might best be served in making the order before us. The adults were before the court, which had an opportunity to observe them and judge of their fitness. The modification about which plaintiff complains does not differ greatly from the decree concerning the custody of the children entered the previous July, to which she agreed. Under the circumstances, where the chancellor is in a better position to determine the matter than is this tribunal, we cannot say that the modification of the order with reference to the custody of the children was clearly wrong. Buehler v. Buehler, 373 Ill. 626; Hitchcock v. Hitchcock, 373 Ill. 352; Pribyl v. Pribyl, 250 Ill. App. 349; Floberg v. Floberg, 358 Ill. 626.

Plaintiff complains of the action of the trial court in denying her petition for an increase in the award of maintenance money. Plaintiff agreed to the original award of \$100 for the maintenance of both children and no complaint that this amount was insufficient was made until defendant filed his petition for modification of the order regarding custody of the children. There is no evidence that the amount originally allowed was not sufficient, but plaintiff sought to show that defendant could afford to pay more.

Plaintiff with her two children reside with her father, Mr. Lipson, who is apparently a man of wealth and who is very generous toward his daughter. She also has in her own name considerable income, although her testimony indicates uncertainty as to how much this is. She testified that her income in 1938, was \$6500, and for 1939, \$4300, although her father, who seems to be a careful business man and is a lawyer of large experience, says that in 1939, she contributed \$5900 toward household expenses. She also referred to a building erected with \$18,000 or \$20,000 which she said her father owed her on a loan which he made from her trust fund of \$50,000. Defendant in his verified answer to plaintiff's counter-petition states that his 1939 income was less than \$7000.

There is no evidence that there has been any change in

children might best be served in making the order before. The adults were before the court, which had an opportunity to observe them and judge of their fitness. The modification about which plaintiff complains does not differ materially from the decree concerning the custody of the children entered the previous day, to which she agreed. Under the circumstances, where the children are in a better position to determine the better than is this tribunal, we cannot say that the modification of the order with reference to the custody of the children was clearly wrong. Traylor v. Traylor, 375 Ill. 686; Hitchcock v. Hitchcock, 375 Ill. 688; Priddy v. Priddy, 350 Ill. App. 348; Flanagan v. Flanagan, 358 Ill. 688.

Plaintiff complains of the action of the trial court in denying her petition for an increase in the award of maintenance money. Plaintiff agreed to the original award of \$100 for the maintenance of both children and no complaint that this amount was insufficient was made until defendant filed his petition for modification of the order regarding custody of the children. There is no evidence that the amount originally allowed was not sufficient, but plaintiff sought to show that defendant could afford to pay more.

Plaintiff offers two children reside with her father, Mr. Lipson, who is apparently a man of wealth and who is very generous toward his children. She also has in her own home considerable income, although her testimony indicates uncertainty as to how much this is. She testified that her income in 1935 was \$800, and for 1936, \$800, although her father, who seems to be a wealthy business man and is a lawyer of some experience, says that she contributed \$800 toward household expenses. She also testified to a building erected with \$5,000 or \$6,000 which was given to her father and on a loan which he made from the estate of her father. Defendant in his verified answer to plaintiff's complaint states that his 1935 income was less than \$700. There is no evidence that there had been any change in

the circumstances of the children since the entry of the divorce decree six months before which rendered the agreed allowance for their support insufficient. A court will not review its decree upon facts which existed at the time the decree was entered, and an award of support money should not be increased unless the conditions of the children have changed since the time the original decree was entered. Smith v. Smith, 334 Ill. 370; Cole v. Cole, 142 Ill. 19; Pribyl v. Pribyl, 250 Ill. App. 349; Helkelkia v. Sonzinski, 223 Ill. App. 30.

To determine infallibly just what surroundings and circumstances would best serve the interest of children is beyond the powers of any court. The chancellor had the best opportunity to determine this, and as his conclusions are not manifestly wrong they will be affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J. concur.

-5-

the circumstances of the children since the entry of the divorce decree six months before which rendered the agreed allowance for their support insufficient. A court will not review its decree upon facts which existed at the time the decree was entered, and an award of support money should not be increased unless the conditions of the children have changed since the time the original decree was entered. Smith v. Smith, 332 Ill. 575; Gold v. Gold, 142 Ill. 19; Priddy v. Priddy, 320 Ill. App. 548; Reinecke v. Reincke, 323 Ill. App. 50.

To determine intelligibly just what surroundings and circumstances would best serve the interest of children is beyond the powers of any court. The chancellor had the best opportunity to determine this, and as his conclusions are not manifestly wrong they will be affirmed.

ATTEST.

O'Connor, P. J., and Schofield, J. concur.

41620

BEULAH BURTON,

Appellant,

v.

JAMES CAHILL,

Appellee.

3101.A.393
APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

A default judgment was entered against defendant in a tort action; after the term at which the judgment was entered defendant filed a petition to vacate it, which motion prevailed, the judgment was vacated and the service of summons quashed. Plaintiff appeals.

October 24, 1939, plaintiff filed a complaint against defendant alleging that he had wilfully and maliciously assaulted her, inflicting injuries; summons was issued and returned by the sheriff not found; two alias summonses were subsequently issued and likewise returned not found; thereupon Irving Greenfield, attorney for plaintiff, asked leave of court to have Melvin Kanter appointed to serve summons upon the defendant, and such order was entered; another alias summons was issued and returned by Kanter, certifying that he had served it on the defendant James Cahill, personally; subsequently, defendant not appearing, an order of default was entered against him and the matter was set down for hearing. On May 3, 1940, the court entered judgment for plaintiff and against defendant for \$750 and found that malice was the gist of the action.

July 25, 1940, defendant's attorney served notice on the attorney for plaintiff that on the following day he would appear in court and ask that the judgment be vacated; on the following day he presented his verified petition asserting that defendant did not receive a copy of any summons in this cause; that the first knowledge he had of the law suit was on July 24, 1940, when he was served with a capias demand by the sheriff. The petition alleged that Kanter was an attorney associated with Irving Greenfield, the attorney for plaintiff; it also denied the assault on plaintiff.

3101A-393

41820

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY,

BEULAH BURTON,
v.
JAMES GALLI,
Appellee.

MR. JUSTICE NEARLY DELIVERED THE OPINION OF THE COURT.

A default judgment was entered against defendant in a tort action; after the term at which the judgment was entered defendant filed a petition to vacate it, which motion prevailed, the judgment was vacated and the service of summons quashed. Plaintiff appeals.

October 24, 1939, plaintiff filed a complaint against defendant alleging that he had willfully and maliciously assaulted her, inflicting injuries; summons was issued and returned by the sheriff not found; two alias summonses were subsequently issued and likewise returned not found; thereupon Irving Greenfield, attorney for plaintiff, asked leave of court to have Melvin Kanter appointed to serve summons upon the defendant, and such order was entered; another alias summons was issued and returned by Kanter, certifying that he had served it on the defendant James Galli, personally; subsequently, defendant not appearing, an order of default was entered against him and the matter was set down for hearing. On May 3, 1940, the court entered judgment for plaintiff and against defendant for \$750 and found that malice was the gist of the action.

July 25, 1940, defendant's attorney served notice on the attorney for plaintiff that on the following day he would appear in court and ask that the judgment be vacated; on the following day he presented his verified petition asserting that defendant did not receive a copy of any summons in this cause; that the first summons he had of the law suit was on July 25, 1940, when he was served with a capias demand by the sheriff. The petition alleged that Kanter was an attorney associated with Irving Greenfield, the attorney for plaintiff; it also denied the assault on plaintiff.

Counsel for plaintiff then stated to the court that he was served with this notice on the previous afternoon, and requested leave to file an answer to the petition and that the matter be set down for hearing; that he was not ready to proceed immediately with the hearing as he had had no opportunity to obtain his witnesses. The court, however, ordered the hearing to proceed forthwith.

Defendant testified he was never served with summons. At the conclusion of defendant's testimony counsel for plaintiff again asked the court for leave to file an answer to the petition and that the matter be set down for hearing. George Wilkinson then testified for defendant that he received the summons on February 26, 1940, and not defendant Cahill. Kanter then made a statement to the court asserting he had served summons upon James Cahill and that plaintiff was with him at the time and identified Cahill as the defendant. Again leave was asked to file an answer to the petition and that the matter be set down for a hearing. The court denied the motion and entered an order vacating the judgment and quashing the service of summons.

It has been repeatedly held that when a judgment of a court of general jurisdiction recites that there was actual service of process upon a defendant in apt time and there is nothing in the record to contradict such return, it cannot be impeached by evidence dehors the record, although in a proper case a false return may be set aside in equity. Waterbury Nat. Bank v. Reed, 231 Ill. 246, and cases there cited.

As defendant's motion to vacate the judgment was not presented within 30 days, the proper practice is by a complaint in chancery seeking to vacate the judgment. Chapman v. North American Ins. Co., 292 Ill. 179, holds that the sheriff's return cannot be questioned after the term is ended by error coram nobis.

We therefore treat the petition as the commencement of a proceeding in equity, as was done in Nikola v. Campus Towers Apt. Bldg. Corp., 303 Ill. App. 516. The rule in chancery proceedings

Counsel for plaintiff then stated to the court that he

was served with this notice on the previous afternoon, and requested leave to file an answer to the petition and that the matter be set down for hearing; that he was not ready to proceed immediately with the hearing as he had had no opportunity to obtain his witnesses.

The court, however, ordered the hearing to proceed forthwith.

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the conclusion of defendant's testimony counsel for plaintiff again

asked the court for leave to file an answer to the petition and

that the matter be set down for hearing. George Wilkinson then

testified for defendant that he received the summons on February

26, 1940, and not defendant Cahill. Kanter then made a statement

to the court asserting he had served summons upon James Cahill and

that plaintiff was with him at the time and identified Cahill as

the defendant. Again leave was asked to file an answer to the

petition and that the matter be set down for a hearing. The court

denied the motion and entered an order vacating the judgment and

quashing the service of summons.

It has been repeatedly held that upon a judgment of a

court of general jurisdiction recites that there was actual service

of process upon a defendant in due time and there is nothing in the

record to contradict such return, it cannot be impeached by evi-

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As defendant's motion to vacate the judgment was not pre-

sented within 30 days, the proper practice is by a complaint in

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Ins. Co., 292 Ill. 172, holds that the sheriff's return cannot be

questioned after the term is ended by error coram nobis.

We therefore treat the petition as the commencement of a

proceeding in equity, as was done in Nikola v. James Fowler, 191

Ill. App. 216. The rule in chancery proceedings

is that leave must be given to the opponent to answer and the cause must be set down for hearing upon the issues made. Circumstances like those now before us were considered in Topel v. Personal Loan & Savings Bank, 290 Ill. App. 558, where the reviewing court held that the trial court was clearly in error in refusing to allow a pleading to be filed to the petition to vacate the judgment; that this error improperly deprived the party of the right to test the sufficiency of the petition or to deny the facts alleged therein. It has also been held that even where the party fails to ask the court for leave to file a pleading to a petition it is the duty of the court to enter a rule to plead. Barnes v. Chicago City Ry. Co., 185 Ill. App. 148; Wagener v. Western Electric Co., 213 Ill. App. 326.

Defendant asserts that the service of summons was void because it was served by an attorney representing plaintiff. The service was made by Melvin Kanter, while the attorney for the plaintiff is Irving Greenfield. Nowhere in the record does Kanter appear as attorney for plaintiff. Kanter was authorized to serve summons, being duly appointed by the court under §6, chapter 110 (Civil Practice act) which provides that "Writs shall be served by a sheriff, or if he be disqualified, by a coroner of some county of the State. The court may, in its discretion upon motion, order service to be made by a private person." There is no merit in this point.

We hold that the request of plaintiff to file an answer to defendant's petition and to set down the case for hearing should have been allowed, and for the error in denying this the judgment is reversed and the cause is remanded for further proceedings consistent with what is said in this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P.J., and Matchett, J. concur.

is that leave must be given to the opponent to answer and the cause must be set down for hearing upon the issues made. Circumstances like those now before us were considered in Touge v. Personal Loan & Savings Bank, 290 Ill. App. 585, where the reviewing court held that the trial court was clearly in error in refusing to allow a pleading to be filed to the petition to vacate the judgment; that this error improperly deprived the party of the right to test the sufficiency of the petition or to deny the facts alleged therein. It has also been held that even where the party fails to ask the court for leave to file a pleading to a petition it is the duty of the court to enter a rule to plead. Barnes v. Chicago City Ry. Co., 185 Ill. App. 148; Wakeney v. Western Electric Co., 213 Ill. App. 326.

Defendant asserts that the service of summons was void because it was served by an attorney representing plaintiff. The service was made by Edwin Kinter, while the attorney for the plaintiff is Irving Greenfield. Nowhere in the record does Kinter appear as attorney for plaintiff. Kinter was authorized to serve summons, being duly appointed by the court under §5, chapter 110 (Civil Practice act) which provides that "writs shall be served by a sheriff, or if he be disqualified, by a coroner of some county of the State. The court may, in its discretion upon motion, order service to be made by a private agent." There is no merit in this point.

We hold that the request of plaintiff to file an answer to defendant's petition and to set aside the cause for hearing should have been allowed, and for the error in denying this the judgment is reversed and the cause is remanded for further proceedings consistent with what is said in this opinion.

REVEREND AND HONORABLE THE JUDGES.

O'Connor, P.J., and Macintosh, J. concur.

41491

JOSEPH F. DIXON,

Appellee,

v.

ANDREW J. MILLER, et al.

On Appeal of MAURICE NEWTON,
et al.,

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

310 I.A. 393²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment against defendant copartnership for \$17,497.12, entered on the finding of the court, and defendants appeal.

as
Defendants, Hallgarten & Company, are stock brokers with offices in New York, London and Chicago. Mr. Emerich, the resident partner, is in charge of the Chicago office. Plaintiff Dixon is a Chicago customer, dealer in securities, with a number of accounts with Chicago brokers. For many years he carried an account with defendants on margin without any special agreement. Strenuous days came to the stock market in Chicago in the fall of 1929. October 24, of that year plaintiff owed defendants \$59,112.49. They held his collateral of a market value which fluctuated on that day between a low of \$55,000 and a high of \$73,000. It was a custom of the house (as plaintiff knew) to require margins of at least 30% and in the case of some securities 50%. By letter and telegram defendants notified plaintiff to deposit \$17,700 more collateral. Plaintiff brought in stocks of the value of \$14,000 taken at the high market of the day. There were later demands (hereafter described) none of which were fully met. November 14, after notice (later to be considered) plaintiff's collateral was sold on the market. Plaintiff contended the sale was unlawful and demanded the securities. The demand was refused.

By his attorneys, Mr. Tone and Mr. Biggs, plaintiff brought suit in the Superior court of Cook county to the March Term, 1930. A

JOSEPH F. DIXON,

Appellee,

Appellant,

v.

ANDREW J. MILLER, et al.

On Appeal of MAURICE NEWTON,

et al.,

Appellants.

CIRCUIT COURT,

COOK COUNTY,

MR. JUSTICE MATTHEW DELIVERED THE OPINION IN THE COURT.

Plaintiff recovered a judgment against defendant copartnership for \$17,497.12, entered on the finding of the court, and entered into appeal.

as Defendants, Halliester & Company, are stock brokers with offices in New York, London and Chicago. Mr. American, the resident partner, is in charge of the Chicago office. Plaintiff Dixon is a Chicago customer, dealer in securities, with a number of accounts with Chicago brokers. For many years he carried an account with defendants on margin without any special agreement. Numerous days came to the stock market in Chicago in the fall of 1928. October 10 of that year plaintiff owed defendant \$3,114.41. They sold him collateral of a market value which fluctuated and went up between a low of \$55,000 and a high of \$75,000. It was a portion of the money (as plaintiff knew) to reduce margin of at least 50% and in the case of some securities 80%. By letter and telegram defendant notified plaintiff to deposit \$17,500 more collateral. Plaintiff brought in stocks of the value of \$40,000 at the time of the higher price of the day. There were later demands (partially successful) none of which were fully met. November 14, after notice (later to be considered) plaintiff's collateral was sold on the market. Plaintiff contended the sale was unlawful and demanded the securities. The demand was refused.

By his attorneys, R. Todd and J. L. ... Plaintiff moved and asked in the Superior Court of Cook County to set aside the judgment.

verified complaint was filed. Mr. Emerich alone was served. An answer was filed by all the partners. Plaintiff did not diligently prosecute the suit. It was stricken from the calendar and in June, 1933, was dismissed for want of prosecution. This suit was begun November 22, 1939, more than ten years after the transaction on which it is based occurred. Emerich alone was served. Other defendants were defaulted. The default was set aside upon their entry of a general appearance.

The parties are agreed defendants had a right to sell upon giving plaintiff reasonable notice. Plaintiff contends the notice given was not reasonable; defendants say it was. This is the question.

We have described the call for margins on October 24, 1929, and the response. October 29, plaintiff owed \$48,374.45. Defendants held collateral which fluctuated from \$51,000 to \$56,000 in market value. By letter and telegram defendants requested additional margins of \$13,500. November 4, plaintiff brought in \$2,100 in stocks. November 6, Mr. Peirce, defendants' Chicago manager, took the matter up with plaintiff. Peirce says plaintiff said he couldn't put up more collateral. Peirce also says (plaintiff does not remember) plaintiff said if defendants sold him out he would sue. Next day defendants referred the matter to their attorneys, Chapman and Cutler. On the same day (Thursday) at 4:45 P.M., the attorneys caused this notice to be served on plaintiff:

"We are enclosing herewith a statement of your account with Hallgarten & Co. as of the close of business on November 6, 1929. On behalf and at the express directions of Hallgarten & Co. for whom we are acting as attorneys, you are hereby notified for and on behalf of Hallgarten & Co. and by Hallgarten & Co. to take up said account and pay therefor to Hallgarten & Co. by 12:00 o'clock noon, Central Standard Time, on Saturday, November 9, 1929, and that if said account is not taken up and paid by said time, Hallgarten & Co. will take such action with respect thereto as they are entitled."

Plaintiff saw Peirce again on Friday. Plaintiff offered some real estate bonds which Peirce rejected. Plaintiff asked Peirce to hold off the sale over the week end. Peirce told him he would give him until Wednesday, November 13, on condition he would

verified complaint was filed. Mr. American alone was served. An answer was filed by all the partners. Plaintiff did not diligently prosecute the suit. It was stricken from the calendar and in June, 1933, was dismissed for want of prosecution. This suit was begun November 23, 1932, more than ten years after the transaction on which it is based occurred. American alone was served. Other defendants were defaulted. The default was set aside upon their entry of a general appearance.

The parties are agreed defendants had a right to sell upon giving plaintiff reasonable notice. Plaintiff contends the notice given was not reasonable; defendants say it was. This is the question.

We have described the call for margin on October 24, 1932, and the response. October 29, plaintiff owed \$48,374.45. Defendants held collateral which fluctuated from \$51,000 to \$58,000 in market value. By letter and telegram defendants requested additional margins of \$13,500. November 4, plaintiff brought in \$2,100 in stocks. November 6, Mr. Peirce, defendants' Chicago manager, took the matter up with plaintiff. Peirce says plaintiff said he couldn't put up more collateral. Peirce also says (plaintiff does not remember) plaintiff said if defendants sold him out he would sue. Next day defendants referred the matter to their attorneys, Chapman and Cutler. On the same day (Thursday) at 4:45 P.M., the attorneys caused this notice to be served on plaintiff:

"We are enclosing herewith a statement of your account with Hallgarten & Co., as of the close of business on November 6, 1932. On behalf and at the express directions of Hallgarten & Co., for whom we are acting as attorneys, you are hereby notified for and on behalf of Hallgarten & Co., and by Hallgarten & Co., to take up said account and pay therefor to Hallgarten & Co. by 12:00 o'clock noon, Central Standard Time, on Saturday, November 6, 1932, and that if said account is not taken up and paid by said time, Hallgarten & Co. will take such action with respect thereto as they are entitled to."

Plaintiff saw Peirce again on Friday. Plaintiff offered some real estate bonds which Peirce rejected. Plaintiff asked Peirce to hold off the sale over the week end. Peirce told him he would give him until Wednesday, November 13, on condition he would

put the account in shape. The demand that the account be taken up was not withdrawn. Plaintiff said he would bring additional cash; that he would rediscount the real estate bonds. He says Peirce said "All right." November 12, plaintiff brought in \$7,500 in stocks.

November 13, the balance due defendants was \$45,693.72, exclusive of \$4,375 which plaintiff owed on a September purchase by defendants for him of 200 shares of General Gas & Electric stock on a "when, as and if issued" basis. This particular stock was then worth \$1,600 less than the purchase price. November 13, was the last day of plaintiff's time extended. Plaintiff's indebtedness was slightly less; his collateral less valuable than when demand was made to close the account.

On this day (defendants say at 2:35 P.M. - plaintiff 3:30 P.M.) a further notice was served on plaintiff at defendants' office:

"November 13, 1929

Mr. J. F. Dixon,
Care, M. J. Traub & Co.,
208 South LaSalle Street
Chicago, Illinois

Dear Sir:

Our attorneys, Messrs. Chapman and Cutler, have heretofore notified you under our authority and on our behalf to take up your account with us and pay therefor by 12:00 o'clock noon, Central Standard Time, Saturday, November 9, 1929. This account having not been taken up and paid for, you are hereby notified that unless said account is taken up and paid for by 9:00 o'clock, Central Standard Time, Thursday, November 14, 1929, we will sell the securities in said account for your account and risk on stock exchanges where such securities are listed, or if any of said securities are unlisted then in such market as we can find therefor, and that we will hold you liable for any deficiency in said account."

A written notation by McEllin, cashier for defendants, shows 2:35 P.M. Plaintiff testifies that when he received this notice he protested its fairness to McEllin (who replied he just "worked there"), and asked for a statement which McEllin told him would take about an hour to make out. Plaintiff says he told McEllin if they felt that way about it he would go and arrange to get the money, and McEllin told him to come back about 5 o'clock. Plaintiff says

put the account in shape. The demand that the account be taken up was not withdrawn. Plaintiff said he would bring additional cash; that he would rediscuss the real estate bonds. He says Police said "All right." November 12, Plaintiff brought in \$7,500 in stocks. November 12, the balance due defendants was \$45,683.72, exclusive of \$4,375 which Plaintiff owed on a September purchase by defendants for him of 200 shares of General Gas & Electric stock on a "when, as and if issued" basis. This particular stock was then worth \$1,600 less than the purchase price. November 13, was the last day of Plaintiff's time extended. Plaintiff's indebtedness was slightly less; his collateral loss valuable than when demand was made to close the account.

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McEllin said defendants were afraid of the market. Plaintiff testifies he went from defendants' office to the Northern Trust Company, saw Mr. Mooney, the assistant cashier (now dead); then to the office of his attorney, Mr. Biggs; then back to defendants' office where he again saw McEllin and received a statement, which without including the "when, as and if" stock transaction showed a balance due defendants of \$45,693.72. Plaintiff says he told McEllin he had made arrangements at the Northern Trust Company to get the money next morning and would be in with it, and McEllin said "O. K." He did not tell McEllin what time in the morning.

Plaintiff further says that on the morning of the 14th he went to the office of Biggs, they then went to the Northern Trust Company and when the bank opened he got \$46,000 from Mr. Mooney, the assistant cashier; then with Bacchi (a messenger for the bank) he, Biggs (now dead) and two guards went to defendants' office at 120 S. LaSalle Street, where the money was tendered to McEllin, Peirce and Emerich, who refused it. He says the money was carried by Bacchi in a black satchel. They arrived at defendants' office about 9:25 A. M. They stayed at the office about ten minutes, then went back to the Northern Trust Company, returned the money; then to Biggs' office where Biggs called defendants by telephone. Plaintiff says he stayed at Biggs' office until about 2:00 P.M. He heard Biggs say to Mr. Bangs of Cutler and Chapman on the telephone that plaintiff would remain at Biggs office and wanted the securities sent there where he would pay for them. Biggs dictated to his secretary (now Mrs. Carlson) a letter which she wrote and plaintiff signed. Plaintiff says on the next day (the 15th) he telephoned defendants about 9:00 o'clock in the morning, talked to a Mr. Ramsey and McEllin and again demanded his securities.

Bacchi, the messenger, corroborates plaintiff as to the tender. He says on the morning of the 14th, Mooney gave him \$46,000 in gold certificates; that Mooney and Mr. Higginbotham (the paying teller of the bank) told him to go along with plaintiff and be at

McEllin said defendants were afraid of the market. Plaintiff testified he went from defendants' office to the Northern Trust Company, saw Mr. Mooney, the assistant cashier (now dead); then to the office of his attorney, Mr. Biggs; then back to defendants' office where he again saw McEllin and received a statement, which without including the "when, as and if" stock transaction showed a balance due defendants of \$45,000. Plaintiff says he told McEllin he had made arrangements at the Northern Trust Company to get the money next morning and would be in with it, and McEllin said "O. K." He did not tell McEllin what time in the morning.

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Bacchi, the messenger, corroborates plaintiff as to the tender. He says on the morning of the 14th, Mooney gave him \$46,000 in gold certificates; that Mooney and Mr. Higginbottom (the paying teller of the bank) told him to go along with plaintiff and be at

his order. Two guards went with them. He does not think these guards are now with the bank. They were not produced at the trial. Mooney did not tell him what securities to pick up nor give him any list. The witness gave the money to Mr. Higginbotham when he returned. The deposition of Bacchi had been taken prior to the trial. He then said he gave a receipt for the money when he took it as always. On the trial he said he gave no receipt. September 19, 1938, he signed a written statement about this tender which was sent by plaintiff to the New York Stock Exchange. In this statement Bacchi said the tender was made during the month of November, 1929, and did not state the day or time of day.

Marguerite Carlson, stenographer for attorney Biggs at the time, said plaintiff was at the office of Biggs November 13, 1929, about 4:30 P.M.; was there on the morning of the 14th about 8:30, left the office with Biggs and his clerk, Mr. Goltry, and they returned to the office about 10:00 o'clock. She called Emerich for Biggs on the 'phone. She says Biggs told Emerich they had been over there with the money and demanded the securities; that Emerich replied to take it up with Mr. Bangs. She then wrote a letter for Biggs dated November 14, in evidence defendants' Exhibit 8 and plaintiff's Exhibit 9. Plaintiff's Exhibit 9 is on plain paper. Defendants' Exhibit 8 is on the office stationery of attorney Biggs. Both are signed personally by plaintiff. Both demand plaintiff's stocks and purport to confirm a demand made "this day." Plaintiff's Exhibit 9 adds the phrase, "before nine o'clock A.M." omitted from the other. Neither mentions any tender - unthinkable if a tender had been in fact made that morning. She says there was no talk over the telephone on the morning of the 14th between Biggs and Bangs or Biggs and Emerich. She had seen defendants' Exhibit 8 at Biggs' office in 1938. She then made an affidavit and sent it to the office of defendants. She had not examined memorandum or records. She remembered the 14th because on the 13th Mr. Biggs had jocularly told her it was her unlucky day - the day on which she was engaged.

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Goltry testified he went with plaintiff and Biggs to the bank, then to defendants' office on the 14th of November, and that Biggs gave him the letter (Exhibit 9) on the 14th which he delivered to defendants that day. He could fix the date only by the date of the letter.

Miss Rea, stenographer employed by plaintiff, testified that November 15, she was on the extension 'phone and listened to a conversation between plaintiff and defendants' office and heard plaintiff make demands for his securities.

The testimony of Peirce, Emerich and McEllin is to the effect that plaintiff and other persons named were not at defendants' office on November 14, but on November 21, and made a tender a week after everyone knew the securities had been sold. A written memorandum made by Peirce on the 21st corroborates his testimony.

Mr. Bangs of Chapman and Cutler, also refreshing his memory by memorandum made at the time, said that on the morning of November 14, he telephoned Biggs and asked if plaintiff would pay for the securities. Biggs said plaintiff was sitting there at his desk, trying to get funds but did not have them yet. Biggs said he would call Bangs later and Bangs told him tender should be made at defendants' office and securities delivered there. Bangs called Biggs at 9:30 and was told he was out. He called him again at 9:35, got him and asked if plaintiff was able to pay. Biggs said he was not. Bangs reported this to defendants' office, talking with McEllin. The memorandum of Bangs is in the record. It was dictated to his secretary the afternoon of the 14th, and bears his initials.

McEllin said he talked by telephone with Biggs about five minutes of nine the morning of the 14th. Biggs asked for the securities but said he knew nothing about payment. McEllin told him to have a certified or cashier's check. Biggs asked fifteen minutes which was granted. McEllin called Biggs about twenty minutes later and asked him if payment had been arranged. Biggs said he did not know anything about it, and McEllin told him he could not hold up

Goitry testified he went with plaintiff and Biggs to the bank, then to defendants' office on the 14th of November, and that Biggs gave him the letter (Exhibit 2) on the 14th which he delivered to defendants that day. He could fix the date only by the date of the letter.

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the sale any longer. The selling order was written out at 9:35 or 9:40 in the morning.

There was rebuttal evidence. We are satisfied, after examination of all the evidence, that the tender of plaintiff was not made on the 14th day of November, 1929, but one week later, namely, November 21. The trial judge declined to pass upon this tender. We regard it important. Plaintiff's evidence on that point is inherently improbable. Undisputed evidence shows that for more than two weeks defendants urged plaintiff to take up his account. They had good reason. The condition of the market was desperate. Plaintiff's margins were far below requirements, as plaintiff knew. Pressed for additional margins plaintiff replied he was unable to get the funds or securities. He now says when informed on the 13th that payment must be made the following day, he walked over to the Northern Trust Company after banking hours and without tendering security obtained a promise of \$46,000 for use on the following morning. If this was his credit why the delay? When we remember this and the precarious condition of the market it is putting it mildly to say that plaintiff's story is inherently improbable.

Again, this proof of tender seems to rest entirely on uncertain oral evidence. The events narrated occurred more than ten years before the witnesses testified. There is not a written memorandum in evidence tending to corroborate. Mooney and Biggs are dead. There is not a written word in the records of the Northern Trust Company tending to show plaintiff received \$46,000 from that bank on November 14, 1929. On the contrary the record kept by Mr. Higginbotham and his testimony show the money for the tender was in fact furnished to plaintiff on November 21.

Another circumstance is persuasive. Suit was brought by plaintiff's attorneys, Mr. Tone and Mr. Biggs, shortly after the sale. A complaint and bill of particulars were filed. Neither in the bill of particulars nor in any count of the complaint is there an allegation that plaintiff made this tender on November 14, 1929.

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If the evidence for plaintiff about the tender is true, Biggs must have known all about it. If true, it would have been alleged.

Against this testimony (inherently improbable) is the clear, consistent, probable testimony of Emerich, Peirce, McEllin and Bangs, corroborated by memorandums they were accustomed to make and which were made at the time of the alleged event. It would be an ungracious task to review all plaintiff's evidence. What we have said shows the alleged tender cannot be basis for legal liability.

We come to the controlling question whether plaintiff had reasonable notice that the securities would be sold if his indebtedness was not paid. The law seems well settled that there is no fixed rule for determining what constitutes reasonable notice. Meyer, "The Law of Stock Brokers and Stock Exchanges," p. 385, §86 (9), says: "Each case depends upon its particular circumstances, and a period of time which is sufficient in one case may be insufficient in another."

The author points out things which may control in the determination of the question; the condition of the market, whether normal or fluctuating, the amount of the margin in the broker's hands, the relationship of the parties, their situation as to place and length of time the account has been carried, and sometimes the financial condition of the customer if the broker knows what it is. The question of what is a reasonable time is ordinarily one of fact for the jury. It may, however, become a question of law. Earlier demands for margins may have their bearing. A notice of five minutes is insufficient. Sanger v. Price, 114 App. Div. 78; Foster v. Murphy, 135 Fed. 47. A notice of two days has been held, as a matter of law, sufficient where the parties resided in the same place. Stewart v. Gregg, 46 N.Y. 449. The Illinois law applicable and in substance the same is stated in Denton, et al. v. Jackson, 106 Ill. 433 at 437.

Here the situation was that at 3:00 P.M. on November 13, 1929, defendants notified plaintiff that his stocks would be sold

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reasonable notice that the securities could be sold if his indebtedness was not paid. The law seems well settled that there is no fixed rule for determining what constitutes reasonable notice. Meyer "The Law of Stock Brokers and Stock Exchanges," § 385, § 386 (a), says: "Each case depends upon the particular circumstances, and a period of time which is sufficient in one case may be insufficient in another."

The author points out things which may control in the determination of the question: the condition of the market, whether normal or fluctuating, the amount of the margin in the broker's hands, the relationship of the parties, their situation as to place and length of time the account has been carried, and sometimes the financial condition of the customer. If the broker knows what it is, the question of what is a reasonable time is ordinarily one of fact for the jury. It may, however, become a question of law, either demands for margins may have been paid, a notice of five minutes is insufficient. Banker v. White, 114 Ky. 181, 78; Forster v. Murphy, 125 Fed. 47. A notice of two days has been held, as in matter of law, sufficient where the parties resided in the same place. Stewart v. Green, 40 N.Y. 448. The Illinois law applicable and in substance the same is given in Banker et al. v. Green, 108 Ill. 433 at 437. Here the situation was that at 5:00 P.M. on November 12, 1929, defendants notified plaintiff that his stock would be sold

at 9:00 o'clock A. M. the following day if the account was not taken up. The notice was given after the banks closed and the banks would not open before the time of sale. The trial judge said the main basis of his finding was the unreasonableness of the notice of the 13th which was given after banking hours. He said he construed the notice of the 13th as standing alone. He expressly declined to pass on the question of whether any tender was made.

The facts recited above are only partial. The market was in an unusual condition. Demand for margins was made on plaintiff October 24. Plaintiff did not completely comply but defendants admit he did "pretty well." Another demand was made on the 29th with which plaintiff did not comply. He was interviewed personally without results. November 7, he was notified in writing to take up his account by the 9th. He did not comply. The notice was reasonable. November 13, plaintiff was given the supplementary notice above recited. On the morning of the 14th the sale was not made until Mr. Biggs (plaintiff's attorney) had repeatedly stated plaintiff could not pay. In brief, by repeated written and oral notices from October 24, to the morning of November 14, almost three weeks (to be exact, 19 days), plaintiff was urged to increase his margins or take up his account. He failed to comply. We hold the trial court was not justified in basing a finding for plaintiff solely on the theory the notice of November 13, considered alone, was unreasonable. On the contrary we hold that notice to be merely supplementary to other oral and written notices; that the notice to plaintiff was reasonable, and that the tender made November 21, at the office of defendants cannot avail.

The amended complaint charges plaintiff was the owner of 600 shares of the Reiter-Foster Oil Corporation, 100 shares of which were in possession of defendants for safekeeping; that 500 of these shares were delivered to defendants on November 6, 1929, with the request for transfer to plaintiff's name and return to plaintiff, which was promised. This stock was sold with the other securities

at 9:00 o'clock A. M. the following day if the account was not taken up. The notice was given after the bank closed and the bank would not open before the time of sale. The trial judge said the main basis of his finding was the unreasonableness of the notice of the 13th which was given after banking hours. He said he construed the notice of the 13th as standing alone. He expressly declined to pass on the question of whether any tender was made.

The facts recited above are only partial. The market was in an unusual condition. Demand for margins was made on plaintiff October 24. Plaintiff did not completely comply but defendant admit he did "pretty well." Another demand was made on the 25th with which plaintiff did not comply. He was interviewed personally without results. November 7, he was notified in writing to take up his account by the 8th. He did not comply. The notice was reasonable. November 13, plaintiff was given the supplementary notice above recited. On the morning of the 14th the sale was not made until Mr. Biggs (plaintiff's attorney) had repeatedly stated plaintiff could not pay. In brief, by repeated written and oral notices from October 24, to the morning of November 14, almost three weeks (to be exact, 19 days), plaintiff was urged to increase his margins or take up his account. He failed to comply. He held the trial court was not justified in basing a finding for plaintiff solely on the theory the notice of November 13, considered alone, was unreasonable. On the contrary he held that notice to be merely supplementary to other oral and written notices; that the notice to plaintiff was reasonable, and that the tender made November 21, to the office of defendant cannot avail.

The amended complaint charges plaintiff was the owner of 800 shares of the Reister-Foster Oil Corporation, 100 shares of which were in possession of defendant for safekeeping; that 500 of these shares were delivered to defendant on November 6, 1922, with the request for transfer to plaintiff's name and return to plaintiff, which was promised. This stock was sold with the other securities

of plaintiff on November 14. Plaintiff demanded the return of the stock, which was refused. In the suit begun by plaintiff in 1930, which was afterwards voluntarily dismissed, plaintiff alleged that this stock was held by defendants as collateral. The proof tends to show 500 of the 600 shares were delivered to defendants November 6, 1929, to have new certificates issued, 400 in the name of plaintiff and 100 in the name of Edward Velek. As stated, the 600 shares of Reiter-Foster stock were sold by defendants on November 14, 1929, with plaintiff's other stocks. Delivery could not be made because the certificates stood in the names of plaintiff and Velek unindorsed. December 7, 1929, plaintiff refused the request of defendants to give them stock powers for this stock so that delivery could be made. Defendants then bought 500 shares to make delivery on its contract at an additional cost of \$627.50, charged to plaintiff. November 6 and 7, and up to November 14, as already recited, plaintiff was heavily indebted to defendants and defendants under the law had a lien on this stock for payment. Meyer, Law of Stock-brokers and Stock Exchanges, §65 (2), p. 313; Hopper v. Marschner & Co., 94 Col. 475, 31 Pac. (2d), 321. The pleadings indicate that the contention of plaintiff as to the Reiter-Foster stock was an afterthought and without merit.

Defendants further contend the Statute of Limitations pleaded was a bar to this action against all the defendants. Emerich, the resident partner, has at all times been a resident of Cook county in the state of Illinois. The action of plaintiff was for conversion of his stocks. The five year clause of the Statute of Limitations was therefore applicable. The contention of plaintiff is that because the other partners are and always have been non-residents there is no bar of the statute as to them, by reason of §18 of the Limitations Statute. As stated, this action was begun November 22, 1939. The alleged conversion was on November 14, 1929. It is not necessary to decide this or the further contention of defendants that the court erred in the rule of damages applied.

of plaintiff on November 14. Plaintiff demanded the return of the stock, which was refused. In the suit begun by plaintiff in 1930, which was afterwards voluntarily dismissed, plaintiff alleged that this stock was held by defendants as collateral. The proof tends to show 500 of the 600 shares were delivered to defendants November 8, 1929, to have new certificates issued, 400 in the name of plaintiff and 100 in the name of Howard Velez. As stated, the 600 shares of Reiter-Forster stock were sold by defendants on November 14, 1929, with plaintiff's other stocks. Delivery could not be made because the certificates stood in the names of plaintiff and Velez undorsed. December 7, 1929, plaintiff refused the request of defendants to give them stock powers for this stock so that delivery could be made. Defendants then bought 600 shares to make delivery on its contract at an additional cost of \$27.50, charged to plaintiff. November 6 and 7, and up to November 14, as already recited, plaintiff was heavily indebted to defendants and defendant under the law had a lien on this stock for repayment. Meyer, law of stock-brokers and stock exchanges, §25 (2), p. 311; Meyer v. Harwood, 94 Cal. 478, 31 Pac. (4th) 423. The pleadings indicate that the contention of plaintiff as to the Reiter-Forster stock was an afterthought and without merit.

Defendants further contend the statute of limitations pleaded was a bar to this action. It is alleged that the resident partner, had at all times been a resident of Cook county in the state of Illinois. The action of plaintiff was for conversion of his stocks. The five year statute of the statute of limitations was therefore applicable. The contention of plaintiff is that because the other partners are and always were Illinois residents there is no bar of the statute as to them. In section 18 of the Limitations Statute, as recited, this action is begun November 22, 1929. The alleged conversion was on November 14, 1929. It is not necessary to decide this of the further contention of de-

The evidence offered to show tender on November 14, tends much to discredit plaintiff's evidence in its entirety. We hold, as a matter of law, that the sale made on November 14, 1929, was made upon reasonable notice and rightfully; that defendants are not liable to plaintiff by reason thereof. The judgment of the trial court will be reversed with finding for defendants and judgment for them in this court.

REVERSED WITH JUDGMENT HERE FOR DEFENDANTS.

O'Connor, P.J., and McSurely, J., concur.

The evidence offered to show tender on November 14, tends much to discredit plaintiff's evidence in its entirety. We hold, as a matter of law, that the sale made on November 14, 1939, was made upon reasonable notice and rightfully; that defendants are not liable to plaintiff by reason thereof. The judgment of the trial court will be reversed with finding for defendants and judgment for them in this court.

REVERSED WITH JUDGMENT HERE FOR DEFENDANTS.

O'Connor, P.J., and McNulty, J., concur.

41605

CLARA A. BRANSFIELD,
Appellee,

APPEAL FROM

v.

SUPERIOR COURT,

JAMES F. BRANSFIELD,
Appellant.

COOK COUNTY.

310 I.A. 894

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree for divorce on the grounds of adultery. The decree also settled property rights and provided for support for the plaintiff wife and their three children and an allowance for solicitors' fees. The suit was begun December 26, 1935. It was for separate maintenance on the ground that plaintiff was without fault living separate and apart. When the decree was entered on August 2, 1940, by amendments it had been made a suit for divorce. Two specific acts were charged of which defendant was said to have been guilty while the suit was pending, and there was a charge that for several months continuously defendant had been guilty of like conduct.

The original bill disclosed final separation between the parties occurred in November, 1935, when, after periodical leaving and returning, defendant told plaintiff he was through and left taking personal belongings with him. June 1, 1938, there was a supposed reconciliation in which Judge Lupe (before whom their case was then pending) attempted to act as arbitrator. This was merely temporary. The amendments charging adultery followed. Plaintiff testified she did not know of any act charged until October 17, 1938, and of some she did not have knowledge until February 23, 1940.

Arguing for reversal defendant contends the original complaint was insufficient to confer jurisdiction on the court. Attention is called to a motion made January 21, 1937, to strike the complaint. He now argues that exceptions then stated are well taken. The motion said and it is now argued that the complaint is argumentative, states conclusions, fails to allege ability of de-

CLARA A. BRANSFIELD,
Appellee,

JAMES F. BRANSFIELD,
Appellant.

MR. JUSTICE MATHIAS DENIES THE OPINION OF THE COURT.

This is an appeal from a decree for divorce on the grounds of adultery. The decree also settled property rights and provided for support for the plaintiff wife and their three children and an allowance for solicitors' fees. The suit was begun December 22, 1935. It was for separate maintenance on the ground that plaintiff was without fault living separate and apart. When the decree was entered on August 2, 1941, by amendment it had been made a suit for divorce. Two specific acts were charged of which defendant was said to have been guilty while the suit was pending. The first was a charge that for several months continuously defendant had been guilty of like conduct.

The original bill introduced final separation between the parties occurred in November, 1935, when, after a trial lasting and returning, defendant told plaintiff he was leaving and took taking personal belongings with him. June 1, 1936, there was supposed reconciliation in which three days (1936) was then pending) attempted to act as arbitrator. The amendment charging adultery was temporary. The amendment charging adultery was temporary. testified she did not know of any of the charges until 1938, and of some she did not know until 1940.

Arguing for reversal, defendant's counsel said that the complaint was insufficient to sustain the suit and that the attention is called to a motion made by defendant to dismiss the complaint. He now argues that except for the amendment the complaint is taken. The motion said and it is now argued that the complaint is argumentative, states conclusions, fails to state facts of the

defendant or necessity for the support asked, and does not state facts constituting grounds for separate maintenance but on the contrary charges desertion without stating that it was without reasonable and just cause; fails to allege defendant has ceased to support his wife and family since November, 1935, though not living with them. For these and other reasons it is urged the complaint was insufficient to confer jurisdiction on the court.

Before this motion to strike was made defendant filed an answer and afterward an amended answer to the complaint. The original bill prayed for an accounting as to the business in which defendant was engaged and in which plaintiff claimed an interest. That matter had been referred to a master. Defendant in his further answers to the complaint, as amended, did not again set up the matters pointed out in his motion to strike. The motion was apparently made under §45 of the Civil Practice act (Smith-Hurd Anno. Stats., ch. 110, par. 169, p. 287). By that section procedure by motion is substituted for the demurrer by which under the former practice the sufficiency of a pleading was tested. The rule under the former practice was that a party by pleading over waived his demurrer. We hold in proceedings under §45 the same rule is applicable to motions. This section should not be confused with §48 of the Civil Practice act (which is supplementary [Smith-Hurd Anno. Stats., ch. 110, par. 172, p. 290]) and provides procedure (also by motion) for involuntary dismissal for certain defects. Sub (4) of §48 provides that the raising of the defenses there enumerated shall not preclude the raising of them subsequently by answer unless the court shall have made a decision therein. Supreme court Rule 21 (See Smith-Hurd Anno. Stats., §259, 21) makes special provision relating thereto.

When this case came on for trial solicitor for defendant objected to trying the adultery charges urging that the trial should be restricted to issues arising on the complaint for separate maintenance. His objection seems to have been based on a stipulation

defendant on necessity for the support asked, and does not state facts constituting grounds for separate maintenance but on the contrary charges desertion without stating that it was without reasonable and just cause; failure to allege defendant has ceased to support his wife and family since November, 1933, though not living with them. For these and other reasons it is urged the complaint was insufficient to confer jurisdiction on the court.

Before this motion to strike was made defendant filed an answer and afterwards an amended answer to the complaint. The original bill prayed for an accounting as to the business in which defendant was engaged and in which plaintiff claimed an interest. That matter had been referred to a master. Defendant in his further answers to the complaint, as amended, did not again set up the matters pointed out in his motion to strike. The motion was apparently made under §48 of the Civil Practice Act (Smith-Hurd Anno. State, ch. 110, par. 103, p. 307), by that section procedure by motion is substituted for the summary by which under the former practice the sufficiency of a pleading was tested. The rule under the former practice was that a party by pleading over waived his demurrer. We hold in proceedings under §48 the same rule is applicable to motions. This section should not be confused with §48 of the Civil Practice Act (which is supplementary [Smith-Hurd Anno. State, ch. 110, par. 107, p. 307]) and provides procedure (also by motion) for involuntary dismissal for certain defects, and §48 provides that the raising of the defense that a counterclaim is not preclude the raising of them subsequently by answer and the court shall have made a decision therein. (See Smith-Hurd Anno. State, §250.21, which is of a prior version) Lating thereto.

When this came on for trial plaintiff's counsel objected to trying the adultery charges raising the issue of maintenance. His objection seems to have been based on a stipulation

of the parties which is not in the record. We hold the court was not without jurisdiction and the complaint as amended was sufficient to sustain the decree.

Defendant says the evidence was insufficient to prove the charge of adultery. The offense was charged to have been with a woman named "Annie." "Annie" testified on the trial under the name of Agnes Auz. She was not asked whether the name was assumed. She conducted a restaurant at 3681 Archer avenue, near the home of defendant. Defendant was a customer. Her place was near his office. Defendant had an extension 'phone put in, and she answered business calls for him. She was twenty-seven years of age, had been married and divorced. She said he paid her \$5.00 per week for assisting him. Defendant came to see her at her home - how many times she could not remember, maybe once or twice a week. They went to taverns and drank together. On an occasion she attended a banquet with him.

Defendant complains much of salacious testimony given by Hoffenkamp, a bartender, Wenzel, a mechanic, and his present wife Joan, formerly a waitress at the restaurant, who tell of warm embraces and kisses with night adventures which, if true, could not be explained on any theory other than guilt. The motives of these witnesses are questioned. We might hesitate to condemn on their testimony standing alone, but corroborating circumstances for which neither defendant nor "Annie" (both testified) gave interpretation or explanation consistent with their innocence, compels us to the conclusion that the finding of the chancellor, who saw and heard them testify, is fully warranted. We would not be justified in reversing unless the decree were clearly and manifestly against the weight of the evidence.

Plaintiff and "Annie" knew each other and discussed their respective relationships with defendant. Their testimony is in the record. Plaintiff testified that on October 17, 1938, with her sister and another witness, she traced defendant and "Annie" from

of the parties which is not in the record. He told the court was not without jurisdiction and the complaint as amended was sufficient to sustain the decree.

Defendant says the evidence was insufficient to prove the charge of adultery. The offense was charged to have been with a woman named "Annie." "Annie" testified on the trial under the name of Agnes Ann. She was not asked whether the name was assumed. She conducted a restaurant at 3681 Archer Avenue, near the home of defendant. Defendant was a customer. Her place was near his office. Defendant had an extension phone put in, and she answered business calls for him. She was twenty-seven years of age, had been married and divorced. She said he paid her \$5.00 per week for assisting him. Defendant came to see her at her home - how many times she could not remember, maybe once or twice a week. They went to taverns and drank together. On an occasion she attended a banquet with him.

Defendant complains much of evidence testimony given by Hoffenkamp, a bartender, a mechanic, and his present wife Joan, formerly a waitress at the restaurant, who tell of various prices and kisses with night adventures also, if true, could not be explained on any theory other than adultery. The nature of these witnesses are questioned. We might hesitate to concern on their testimony standing alone, but corroborating circumstances for neither defendant nor "Annie" (both testified). Give interpretation or explanation consistent with their innocence, compare us to the conclusion that the finding of the jury was not and that them testify, is fully warranted. We would not be justified in reversing unless the decrees were clearly and manifestly against the weight of the evidence.

Plaintiff and "Annie" knew each other and visited their respective relationships with defendant. Their relation as in the record. Plaintiff testified that on October 15, 1934, with later and another witness, she traced defendant and "Annie" from

the restaurant whence the two started for a ride together. They were lost in the traffic. Plaintiff with her witnesses then went to "Annie's" home. Later defendant and "Annie" appeared and entered. Plaintiff and another watched the front of the house, two other witnesses the rear. The house was dark with the exception of one room. Plaintiff waited until about 12 o'clock. Defendant did not emerge. She called her attorney and the police, knocked on the door, and aroused the occupants. "Annie" answered. Plaintiff asked if Bransfield was there. "Annie" answered (as she herself said, under direction of the defendant) that he was not. Plaintiff secured entrance, says she saw defendant and "Annie" coming out of the door of the lighted room, he putting his shirt into his trousers, she wearing a bathrobe. Defendant's solicitor (wisely, we think) does not attempt an analysis of the evidence. We also forbear.

Defendant claims that plaintiff by renewing marital relations with him after the supposed reconciliation in Judge Lupe's court June 1, 1938, condoned all offenses prior to that time. Plaintiff denies, defendant affirms the existence of such relationship for several weeks. The point is not important. If there was condonation it is elementary it would be upon condition that prior offenses should not be repeated. Condonation is always conditional. We have seen there was repetition. Defendant has not pleaded condonation. It has not been set up either by plea or answer as it must be to avail. Lipe v. Lipe, 327 Ill. 39; Arliskas v. Arliskas, 343 Ill. 112.

There remains for consideration the question whether the adjustment of property rights as provided by the decree was inequitable as defendant contends. There were three children (a boy 19 years of age, a girl 15, and another girl 11). Plaintiff lives at 6601 Mozart street in Chicago in a two-apartment building, the legal title to which is in her name. The legal description of the property is contained in the bill and in the decree. This real

the restaurant whence the two started for a ride together. They were lost in the traffic. Plaintiff with her witnesses then went to "Annie's" home. Later defendant and "Annie" returned and entered. Plaintiff and another watched the front of the house, two other witnesses the rear. The house was dark with the exception of one room. Plaintiff waited until about 12 o'clock. Defendant did not emerge. She called her attorney and the police, knocked on the door, and aroused the occupants. "Annie" answered. Plaintiff asked if Brannfield was there. "Annie" answered (as she herself said, under direction of the defendant) that he was not. Plaintiff secured entrance, says she saw defendant and "Annie" coming out of the door of the lighted room, he putting his shirt into his trousers, she wearing a bathrobe. Defendant's solicitor (wisely, we think) does not attempt an analysis of the evidence. He has forsworn.

Defendant claims that plaintiff is a married woman. Relations with him after the supposed reconciliation in Judge Impe's court June 1, 1938, continued all offenses which at that time, Plaintiff denies, defendant affirms the existence of such relations ship for several weeks. The point is not important. It was a condonation it is elementary it would be upon condition that future offenses should not be repeated. Condonation is always conditional. We have seen there was repetition. Defendant has not denied condonation. It has not been set up either in People v. Brannfield or People v. Brannfield. It must be to avail. People v. Brannfield, 327 Ill. 100; People v. Brannfield, 343 Ill. 112.

There remains for consideration the question of adjustment of property rights as provided in the bill. The bill is equitable as defendant contends. There is no reason why it should not be given effect. It is a bill for the relief of a girl 15, and another girl 15, and another girl 15, at 6801 Mozart street in Chicago in a one-family building, the legal title to which is in her name. The legal title to the property is contained in the bill and in the decree. This bill

estate was appraised by the real estate board at \$12,200. It is encumbered by a trust deed securing a note for \$9000, on which interest has not been paid for four years. Defendant owns the note, interest coupons and trust deed. The decree grants to plaintiff the custody and care of the minor children with a provision that defendant may see them at reasonable times and places. It directs defendant to surrender and cancel the \$9000 note and interest notes and trust deed, and to cause a release of the indebtedness to be filed of record. It also directs defendant to quitclaim all interest in the real estate to plaintiff and in case of his default provides a master in Chancery shall do it for him. Defendant filed in court a schedule of his assets. He did not include the note secured by the trust deed. The evidence shows unpaid taxes against the real estate amounting to about \$5000.

This voluminous record is largely made up of proceedings to compel defendant to pay alimony the court had found to be reasonable for the support of his wife and children. It is apparent he is able but does not intend to support them unless compelled. The evidence shows that in addition to household duties plaintiff performed many valuable services in creating the assets and carrying on the business defendant owns. On the authority of Geisler v. Geisler, 336 Ill. 410, and Kohl v. Montgomery, 373 Ill. 200, 205, we hold there are special circumstances in this case which justified the court in making these provisions a part of the decree.

Upon the filing of defendant's brief plaintiff made a motion to strike it because of failure to observe the rules of this court and particularly Rule 7, relating to the copying of evidence at length in the argument, and also for scandal and impertinence. It is pointed out that of the 52 pages in the brief, upwards of 20 are devoted to copying the abstract of record. The rule was violated. There are other charges it is unnecessary to consider. We have delayed announcement of our decision not wishing to put the parties to the expense of printing another brief. Following the practice of the United States Supreme Court in Green v. Elbert

estate was appraised by the real estate board at \$18,200. It is encumbered by a trust deed securing a note for \$8000, on which interest has not been paid for four years. Defendant owns the note, interest coupons and trust deed. The decree grants to plaintiff the custody and care of the minor children with a provision that defendant may see them at reasonable times and places. It directs defendant to surrender and cancel the \$8000 note and interest notes and trust deed, and to cause a release of the indebtedness to be filed of record. It also directs defendant to disclaim all interest in the real estate to plaintiff and in case of his default provides a master in Chancery shall do it for him. Defendant filed in court a schedule of his assets. He did not include the note secured by the trust deed. The evidence shows unpaid taxes against the real estate amounting to about \$5000.

This voluminous record is largely made up of proceedings to compel defendant to pay alimony the court had found to be reasonable for the support of his wife and children. It is apparent he is able but does not intend to support them unless compelled. The evidence shows that in addition to household duties plaintiff performed many valuable services in erecting the assets and carrying on the business defendant owns. On the authority of Keifer v. Keifer, 336 Ill. 410, and Kohl v. Montgomery, 345 Ill. 309, 325, we hold there are special circumstances in this case which justified the court in making these provisions a part of the decree.

Upon the filing of defendant's brief plaintiff made a motion to strike it because of failure to observe the rules of this court and particularly Rule 7, relating to the copying of evidence at length in the argument, and also for scandal and immateriality. It is pointed out that of the 52 pages in the brief, upwards of 30 are devoted to copying the abstract of record. The wife was violated. There are other charges it is unnecessary to consider. We have delayed announcement of our decision not wishing to put the parties to the expense of printing another brief. Following the practice of the United States Supreme Court in Green v. Biant

137 U. S. 615; Supreme Council of the Royal Arcanum v. Green, 237 U. S. 531, and in conformity with the Illinois practice in Chicago Title & Trust Co. v. Danforth, 236 Ill. 554, and of this court in Robinson v. Rogan, 247 Ill. App. 620, the motion will be now granted. The record shows persistent and determined disregard of marital duty by defendant husband.

The decree will be affirmed.

DECREE AFFIRMED.

137 U. S. 615; Supreme Council of the Royal Arcanum v. Green,

237 U. S. 531, and in conformity with the Illinois practice in

Chicago Title & Trust Co. v. Danforth, 236 Ill. 554, and of this

court in Robinson v. Rosen, 247 Ill. App. 830, the motion will be

now granted. The record shows perstatent and determined disregard

of marital duty by defendant husband.

The decree will be affirmed.

DOREEN AFFIRMED.

41639

BESSIE CASLOW,

Appellee.

v.

CHECKER TAXI COMPANY, a
Corporation, and ERNEST GRAF,
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

3101A 394²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action for personal injuries caused (as alleged) by defendants' negligence, on trial by jury there was a verdict for plaintiff for \$950, on which judgment was entered, and defendants appeal.

September 30, 1939 (a Saturday afternoon), plaintiff, employed as an Elliott Fisher bookkeeper for the Advance Aluminum Castings Corporation at 2742 W. 36th place, Chicago, visited the "Loop" district of Chicago for the purpose of shopping. She accepted the invitation of James Poulos, a fellow employee, to ride down town with him in his automobile. Several other girl employees accepted a similar invitation but left the car before the accident. Reaching State street, Poulos turned north and drove to Madison street, an intersecting street running east and west in the heart of the business district. He turned to the right on Madison, driving east. There were two eastbound lanes of traffic on Madison. Poulos drove in the second lane near to the center of the street. Double street car tracks were in the center of the street. On his right was a lane of traffic in which cars going east passed him. Traffic in the lane in which Poulos drove was at a standstill waiting for the turning of the light on Wabash avenue to the east. Poulos stopped at the alley in the middle of the block; plaintiff got out of the rear seat on the right hand side, walked a car length ahead, then crossed northward toward the other side of the street. A Checker cab driven east by defendant Graf suddenly passed Poulos on the left, and the right hand fender struck plaintiff, according to

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CHUCKLEBERRY, a company that sends
checks to the company, not to the
company.

MR. JUSTICE MONTAGUE DELIVERED THE VERDICT.

plaintiffs for \$500, on which judgment was entered, and which the
defendants' negligence, on trial by jury, was found to be
the cause of the injury. In an action for \$500, on which judgment was entered, and which the
defendants' negligence, on trial by jury, was found to be the cause of the injury.

[illegible]

the testimony of plaintiff and Poulos. Testimony for defendants is to the effect plaintiff ran into the side of the Checker cab. Apparently this testimony was not believed by the jury and is pretty well disapproved by the nature of the injuries plaintiff received, all on her left side. In a semi-conscious condition she was taken to St. Luke's Hospital, and the evening of the same day in an ambulance to Mount Sinai Hospital where she received medical attention from Doctors Miller and Prosterman. Plaintiff remained at Mount Sinai Hospital for four or five days, when she went to the home of her sister. She testified in detail to pain and suffering and to the medical attention she received. This is unimportant as there is no claim damages allowed are excessive.

Defendants earnestly contend that plaintiff as a matter of law was guilty of contributory negligence which bars this suit. It is said a motion at the close of all the evidence for an instruction in defendants' favor should have been given and a motion thereafter for judgment notwithstanding the verdict in favor of defendants should have been allowed.

It is not contended the jury could not reasonably find defendants negligent, but it is said as a matter of law, the evidence shows plaintiff to have been guilty of contributory negligence in two respects. First, that in emerging from between the automobiles and crossing the street to the north she put herself in a position of danger; and secondly, in that she failed to look west and see the oncoming Checker cab. Defendants point out plaintiff was somewhat hard of hearing and call attention to the general rule of law that one thus afflicted has cast upon him the duty of greater care made necessary by such an infirmity. This is the law. I.C.R.E. Co. v. Buckner, 28 Ill. 299; Carroll v. C.B. & Q.Ry. Co., 142 Ill. App. 195.

In support of the contention plaintiff as a matter of law was guilty of negligence, defendants (with numerous others) cite Hooper v. Adams Exp. Co., 289 Ill. 169, 124 N.E. 445, and Kannapel v. Goodyear Tire & Rubber Co., 286 Ill. App. 621, 4 N.E. (2nd) 262.

the testimony of plaintiff and police. Testimony for defendant is to the effect plaintiff ran into the side of the Checker cab. Apparently this testimony was not believed by the jury and is pretty well disapproved by the nature of the injuries plaintiff received, all on her left side. In a semi-conscious condition she was taken

to St. Luke's Hospital, and the evening of the same day in an ambulance to Mount Sinai Hospital where she received medical attention from Doctors Miller and Rosenbaum. Plaintiff remained at Mount Sinai Hospital for four or five days, was removed to the home of her sister. She testified in detail to pain and suffering and to the medical attention she received. This is important as there is no claim for pain allowed in a personal injury.

Defendants earnestly contend that plaintiff is a matter of law was guilty of contributory negligence and that this suit is in said a motion at the close of all the evidence for a judgment in defendants' favor should have been given. Motion contested for judgment notwithstanding the verdict in favor of defendants should have been allowed.

It is not contended the jury could not reasonably find defendants negligent, but it is contended that the evidence shows plaintiff to have been guilty of contributory negligence. First, that in crossing the street to the north side of the intersection and crossing the street to the north side of the intersection of danger; and secondly, in that she did not look out for the oncoming Checker cab. Defendants claim that plaintiff was not hard of hearing and call attention to the general rule that one thus afflicted has cast upon him the duty of extra vigilance. This is the law. Brooklyn v. B. & O. R. Co., 28 Ill. 292; Brooklyn v. B. & O. R. Co., 28 Ill. 292.

In support of the contention that plaintiff was negligent as guilty of negligence, defendants cite Hooper v. Adams Exp. Co., 289 Ill. 182; Hooper v. Adams Exp. Co., 289 Ill. 182; Hooper v. Adams Exp. Co., 289 Ill. 182; Hooper v. Adams Exp. Co., 289 Ill. 182; Hooper v. Adams Exp. Co., 289 Ill. 182.

In the Hooper case an accident occurred at a crossing in the business district of Chicago. The Supreme court said in substance that a plaintiff who placed himself in a position where he could not look out for himself and emerged at a place where his presence could not be expected by the driver of a vehicle, failed to show he was in the exercise of due care. The cases are distinguishable, in particular by the fact that in this case there was evidence from which the jury could reasonably find defendants were at least in part driving on the wrong side of the street. Plaintiff would hardly be obligated to anticipate negligence of this sort on the part of defendants. We do not doubt under all the circumstances related that the question of whether plaintiff negligently put herself in a dangerous position was for the jury to decide. As a matter of fact, the uncontradicted evidence tends to show defendants were at least trying to use for themselves the center of the street which other drivers were not using.

Defendants also argue plaintiff was guilty of negligence, as a matter of law, in not seeing the cab before it hit her. The rule of "stop, look and listen" applicable to railroad crossings is not necessarily applicable to pedestrian motorist cases for obvious reasons. Graham v. Hagmann, 270 Ill. 252, 258. In the 7th Ed., Berry, Automobiles, ch. 22, §3.156, p. 238, the author says:

"A pedestrian need not anticipate as a matter of law that an automobile may approach on the wrong side of the street. A pedestrian is not guilty of contributory negligence per se in failing to look for an automobile approaching on the wrong side of the street, he having no reason to anticipate danger from that direction. Nor is it contributory negligence as a matter of law for a pedestrian not to continue to look, after passing the center of the street, for automobiles running on the wrong side of the street.

"Where a motorist proceeds on the wrong side of the street close to the curb, it has been held that he is bound either to give a signal of warning to any pedestrian who might attempt to cross the street or to run his car at so slow a rate that it would be under such control as not to injure such pedestrian. A motorist on the wrong side of the street is under a duty to keep a strict watch for pedestrians who by statute are required to walk on the left-hand side of the highway."

As a matter of fact, defendant Graf testified he did not see plaintiff until after the car hit her.

In the Hooper case an accident occurred at a crossing in the near district of Chicago. The Supreme Court said in substance that a plaintiff who placed himself in a position where he could not look out for himself and emerged at a place where his presence could not be expected by the driver of a vehicle, failed to show he was in the exercise of due care. The cases are distinguishable, in particular by the fact that in this case there was evidence from which the jury could reasonably find defendants were at least in part driving on the wrong side of the street. Plaintiff would hardly be obligated to anticipate negligence of this sort on the part of defendants. We do not doubt under all the circumstances related that the question of whether plaintiff negligently put himself in a dangerous position was for the jury to decide. As a matter of fact, the uncontested evidence tends to show defendants were at least trying to use for themselves the center of the street which other drivers were not using.

Defendants also argue plaintiff was guilty of negligence, as a matter of law, in not seeing the car before it hit her. The rule of "stop, look and listen" applicable to railroad crossings is not necessarily applicable to pedestrian motorist cases for obvious reasons. Graham v. Hermann, 270 Ill. 587, 95 Ill. 2d 587. In the Wm. Ed.

Berry, Automobiles, ch. 22, § 3.152, p. 254, the author says: "A pedestrian need not anticipate as a matter of law that an automobile may approach on the wrong side of the street. A pedestrian is not guilty of contributory negligence when he is failing to look for an automobile approaching on the wrong side of the street, he having no reason to anticipate danger from that direction. Nor is it contributory negligence as a matter of law for a pedestrian not to continue to look, after passing the center of the street, for automobiles running on the wrong side of the street."

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As a matter of fact, defendant Graf testified he did not

see plaintiff until after the car hit her.

In their reply brief defendants for the first time call attention to §172, ch. 95-1/2 of the Illinois Revised Statutes, 1939 (Laws of 1935, p. 1247), which in substance provides that a pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at any intersection shall yield the right-of-way to all vehicles upon the roadway, and that between adjacent intersections at which traffic control signals are in operation pedestrians shall not cross at any place except a marked crosswalk. Defendants say the cases cited by plaintiff to the point that plaintiff was not guilty of contributory negligence as a matter of law (such as Trout Livery Co. v. People's Gas Light & Coke Co., 168 Ill. App. 56) were all decided prior to this enactment. It has, however, been held in many cases that the violation of such regulations are at the most only prima facie evidence of negligence (Tuttle v. Checker Taxi Co., 274 Ill. App. 525, 530), and even if it is conceded plaintiff in crossing the street at all in this place was violating the law, it would still remain a question for the jury as to whether this violation was the proximate cause of the accident. (Russell v. Richardson, 302 Ill. App. 589, 598; Lerette v. Director General, 306 Ill. 348.) We hold under the facts here appearing the question of plaintiff's contributory negligence was for the jury.

Defendants argue error in that the court refused to give this instruction:

"If you believe from the evidence that the plaintiff could, by looking to the west, have seen the taxicab of the defendant as it was proceeding towards her, and if you believe from the evidence that the plaintiff looked to the east and did not look at all in the direction of the approaching cab that struck her and if you further believe from the evidence that she proceeded to cross Madison Street from the south to the north side thereof without looking in the direction of the cab, then she failed to use reasonable care and caution for her own safety and protection and you should find the defendants not guilty."

To this point defendants again cite Hooper v. Adams Exp. Co., 289 Ill. 169, 124 N.E. 445; Crowe Name Plate & Mfg. Co. v. Dammerich, 279 Ill. App. 103, with a large number of cases from this and other jurisdictions. This offered instruction is the only

instruction abstracted. Under such circumstances the Supreme court in Madison v. Wedron Silica Co., 352 Ill. 60,62,63, and the Appellate court in Govekar v. Kweder, 296 Ill. App. 405,406, hold the point may not be considered. However, we hold the instruction was properly refused. It directs a verdict but ignores the main factual issue between the parties as to whether defendant drove wholly or partially on the wrong side of the street, assuming either that this was immaterial or that defendant drove on the right side of the street. In the second place, it takes from the jury the question of whether a failure to look under circumstances such as these amounts to contributory negligence. In the third place, it singles out one particular fact to which it directs the attention of the jury and takes from the jury the question of whether the assumed negligence of plaintiff in failing to look was the proximate (legal) cause of the injury. It was clearly erroneous. Miller v. Burch, 254 Ill. App. 387, 397; Williams v. Stearns, 256 Ill. App. 425, 434; Consolidated Coal Co. v. Bokamp, 181 Ill. 9; Lerette v. Director General, 306 Ill. 348, 352; and Russell v. Richardson, 302 Ill. App. 589, 598.

Defendants argue with great earnestness that the verdict is against the manifest weight of the evidence. We have given careful consideration to the point. Plaintiff and Mr. Poulos (with whom she was riding) give a consistent narration of the facts. The driver, as we have already stated, was clearly negligent and admits he did not see plaintiff until after the cab hit her. Graf and the witness Wesley (a chauffeur in charge of parking service at 29 E. Madison street) in some respects contradict each other. The testimony of the officers of the Accident Prevention Division indicates that at St. Luke's Hospital while plaintiff was undergoing the pain and shock of the accident they got her to make statements which the injuries she received tend to show were not according to fact.

The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McSurely, J. concur.

instruction abstracted. Under such circumstances the supreme court in Madison v. Weston Glass Co., 388 Ill. 60, 61, 62, and the Appellate court in Goveker v. Weaver, 398 Ill. App. 438, 439, hold the point may not be considered. However, we hold the instruction was properly refused. It directs a verdict but ignores the main factual issue between the parties as to whether defendant drove wholly or partially on the wrong side of the street, assuming either that this was material or that defendant drove on the right side of the street. In the second place, it takes from the jury the question of whether a failure to look under circumstances such as these amounts to contributory negligence. In the third place, it singles out one particular fact to which it directs the attention of the jury and takes from the jury the question of whether the assumed negligence of plaintiff in failing to look was the proximate (legal) cause of the injury. It was clearly erroneous. Miller v. Burch, 384 Ill. App. 387, 397; Williams v. Stevens, 386 Ill. App. 441, 442; Consolidated Coal Co. v. Bokamp, 181 Ill. 9; Leister v. Altonston Terminal, 308 Ill. 348, 352; and Russell v. Richardson, 307 Ill. App. 538, 539.

Defendants argue with great emphasis that the verdict is against the manifest weight of the evidence. We have given careful consideration to the point. Plaintiff and his counsel claim that when she was riding) give a constant narration of the facts. The driver, as we have already stated, was clearly negligent and that he did not see plaintiff until after she had crossed the street and the witness Wesley (a chauffeur in charge of a limousine) testified that Madison street) in some respects contradictory to the testimony of many of the officers of the Accident Investigation Division who testified that at St. Luke's Hospital while plaintiff was recovering from the shock of the accident they did not see her in the street when the injuries she received tend to show that she was not in the street.

The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McLaughlin, J. concur.

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20th, Pt 3

OSCAR NELSON,
Public Accounts,

310 I.A. 599

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DANIEL A. URETZ,  
Intervening Petitioner,  
Appellee,

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.



CHARLES H. ALBERS, Receiver of  
Crawford State Savings Bank, a  
corporation,  
Appellant.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Charles H. Albers, as receiver of the Crawford State Savings Bank, appeals from an order or decree of the Circuit court allowing Daniel A. Uretz, intervening petitioner, \$10,000 attorney's fees for services alleged to have been rendered on behalf of a depositors' committee organized by him pursuant to the closing of the bank by the auditor of public accounts and the filing of a bill for liquidation and dissolution of the bank.

The bank closed its doors January 15, 1931. Thereafter the auditor of public accounts appointed a receiver, pursuant to the power vested in him under section 11 of an Act to revise the law with relation to banks and banking (Ill. Rev. Stats., <sup>21929</sup>chap. 16, <sup>1</sup>~~3-1939~~) and filed a bill of complaint in the circuit court <sup>Ill. Gen. Ass. Stats. Ann. 10 01 et seq.</sup> alleging in substance that the capital stock of the bank had become impaired, that its business was being conducted in an unsafe manner, that a receiver had been appointed by him, and invoking the court's jurisdiction for the purpose of liquidating the assets of the bank, compromising, adjusting and settling all controverted and mooted questions relating to accounts receivable and other items due and owing to the bank, to enforce the liability against

1930

Director of Public Security  
New York City

V.

CHARTERED BANK OF THE STATE OF NEW YORK  
a corporation

DANIEL A. WATERS,  
Investigating Commissioner,  
New York City

V.

CHARLES W. ALLEN, et al.,  
Grainland State Savings Bank,  
a corporation,  
Defendant.

M. J. FIDELITY AND THE FRIENDLY SOCIETY

Charles W. Allen, et al., as Receiver of the Grainland State

Savings Bank, against the Grainland State Savings Bank, et al.,

complaint for recovery of the balance of the deposit of the

Grainland State Savings Bank, et al., in the Grainland State

Savings Bank, et al., in the Grainland State Savings Bank, et al.,

the filing of a bill for recovery of the balance of the deposit of the

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stockholders, settle the claims of depositors, and that the bank's corporate existence be dissolved and its charter canceled. ✓

Shortly after the bank closed, Daniel A. Uretz, who had been a practicing attorney in Chicago for many years, called a meeting of the depositors of the bank in a neighboring theater, for the purpose of discussing the advisability of attempting a reorganization of the bank. This meeting was attended by depositors, varying in number according to the testimony of the respective parties between 600 and 3,500. Uretz was selected as chairman of the committee, although he was not a depositor of the bank, and certain depositors were at the same time designated as members of the committee. The sole purpose of the meeting was to effect a reorganization of the bank, and Uretz was authorized by resolution of the depositors to proceed with efforts toward that end. He conferred with the auditor of public accounts and others, but after some four or six months it became apparent that the bank could not be reorganized and the project was abandoned. Thereafter, the receiver proceeded in the usual manner with the liquidation of the bank.

Meanwhile, April 29, 1931, Uretz had leave of court to file his appearance in the liquidation proceeding, and May 2, 1933, he filed a petition asking for the allowance of fees, alleging that he had rendered services to the extent of (275-1/2) <sup>275 1/2</sup> hours. To this petition Henry Otto, predecessor of the present receiver, filed a special demurrer, alleging that Uretz, as intervening petitioner, had not made or stated a case entitling him to the allowance of fees from the estate, that the petitioner was not an officer appointed by the court or by the auditor of public accounts, and that the court had no authority to order the payment of fees. No order was ever entered disposing of the demurrer. Nevertheless, in May, 1939, Uretz filed an amended petition which raised his time claim from (275-1/2) <sup>275 1/2</sup> hours to 440 hours, and for the allowance of an





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additional amount. The matter was referred to a master, who found that the fair, reasonable and customary charge for such services is \$10 an hour, and that based upon hours of service rendered, results obtained and the amount involved, Uretz should be allowed a fee of \$10,000, upon the theory that "the liquidation proceedings herein were instituted primarily for the benefit of the depositors \*\*\* and that except for a comparatively small sum, all of the funds now in the hands or hereafter coming into the hands of the receiver, is money held for the benefit of the depositors," and that "based upon the equitable theory of charging a fund with the amount due the petitioner \*\*\* and also of preventing a multiplicity of suits against the depositors," Uretz was entitled to be reimbursed out of the assets of the estate.

It appears from the evidence that March 5, 1931, shortly after the meeting of the depositors, Joseph B. Ford, who was present at the meeting and had a substantial account in the bank, wrote to Uretz asking how he expected to be compensated for his services as chairman and legal adviser of the committee, to which Uretz replied: "In answer to your question as to how I expect to be compensated for the work done by me as Chairman and Legal Adviser of the Depositors and Protective Committee of the Depositors of the Crawford State Savings Bank, permit me to say that if the bank is not reorganized, there would be no possibility for me to recover from any person, not having obtained results. However, if we succeed in reorganizing the bank or consolidating it with some other bank, whereby the depositors would receive through the action and work of the committee and myself the greatest amount possible on their deposits, which would otherwise not be available, I expect to make an appeal to the depositors to sanction compensation to me for my work and to the committee for its work, for a reasonable amount which should be approved by the Court before whom this case is now pending. \*\*\* Under no circumstances do I expect to hold the

additional amount. The latter was referred to a committee, who were to  
that the fair, reasonable and satisfactory of such a view is  
\$10 an hour, and that based upon hours of service rendered, benefits  
obtained and the amount involved, it should be at once a fact of  
\$10,000, upon the theory that "the distribution provisions herein  
were instituted primarily for the benefit of the positions  
and that except for a comparatively small sum, all of the funds now  
in the hands of the estate remain in the hands of the estate,  
is money held for the benefit of the positions, and that "passed  
upon the estate theory of an estate fund with the amount due  
the petitioner and also of preventing a multiplicity of suits  
against the positions." Under the will to be addressed out of  
the assets of the estate.

It appears from the will that the committee, shortly  
after the death of the testator, Joseph L. ... the will  
at the meeting and had a substantial amount in the bank, wrote to  
Trust asking how he expected to be compensated for his services as  
chairman and legal adviser of the committee, of which Trust was  
"in answer to your question as to how I expect to be compensated  
for the work done by me as chairman and legal adviser of the  
Depositors and Protective Committee of the positions of the Trust-  
fund State Savings Bank, I think it is a very small sum, but it is not  
reorganized, it is a small sum, but it is not a very large sum,  
any person, no matter what his position, should be compensated for his services  
in proportion to the work he does, and I think it is a very small sum,  
whereby the depositors would receive a small sum, but it is not a very large sum,  
of the committee and Trust, in proportion to the work he does, and I think it is a very small sum,  
deposits, which would be a small sum, but it is not a very large sum,  
an appeal to the committee to a position to which I am not entitled,  
work and to the committee for its services, to which I am not entitled,  
which should be approved by the Joint Board of Directors, and I think it is a very small sum,  
Under no circumstances do I expect to hold the

~~A~~  
committee liable for any compensation personally or individually. The whole burden must be met by the depositors equally and proportionately." It thus appears that the sole purpose of the formation of the depositors' committee was to effect a reorganization of the bank, and according to Uretz's own statement, made immediately after the bank was closed and the depositors' committee organized, he expected no compensation unless a reorganization was effected. Notwithstanding these circumstances, and the fact that the reorganization had failed within <sup>6</sup>(six) months after the bank closed, Uretz claims to have continued rendering services in connection with the liquidation of the bank until 1939. These services are not predicated upon any written or oral contract with the receiver, but are based upon voluntary efforts made by Uretz in assisting the receiver to realize more on the sale of assets in the course of the liquidation, and it is argued by his counsel that he was instrumental in procuring substantially \$60,000 more through sales of assets of the bank than would otherwise have been obtained.

After the master had made his report recommending the allowance of \$10,000, and the chancellor had overruled the receiver's exceptions to the report, an order or decree was entered by the chancellor which reads in part: "It is therefore ordered and decreed that upon the approval of the auditor of public accounts of the State of Illinois or his successor, and subject to such approval, that Charles H. Albers, receiver of the Crawford State Bank or his successor, pay out of the assets of the Crawford State Savings Bank remaining in his possession to Daniel A. Uretz, the petitioner, in due course of administration the sum of ten (\$10,000<sup>00</sup>) thousand dollars which sum the court finds is a reasonable fee for the services rendered by petitioner, together with the sum of seven hundred thirty-two dollars and forty-five cents (\$732.45) as and for master's fees herein." The force of this provision of the decree is dependent upon the exercise of discretion

4

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immediately after the bank was closed and the depositors' committee  
organized, he expected no compensation and as a reorganization was  
effected. Notwithstanding these circumstances, and the fact that  
the reorganization had failed within six months after the bank  
closed, Uretz claims to have continued receiving services in connec-  
tion with the liquidation of the bank until 1939. These services  
are not predicated upon any written or oral contract with the re-  
ceiver, but are based upon voluntary efforts made by Uretz in assist-  
ing the receiver to realize more on the sale of assets in the course  
of the liquidation, and it is alleged by his counsel that in a fir-  
strumental in procuring substantially \$50,000 more known sales  
of assets of the bank than could otherwise have been obtained.  
After the latter had made his report recommending the allow-  
ance of \$10,000, and the claim filed has covered the receiver's  
exceptions to the report, on only one of these was agreed by the  
chancellor which reads in part: "The liquidation of the bank  
decreed that upon the approval of the liquidation of the bank  
of the State of Illinois on the receiver, and subject to such  
approval, the Chancellor, Illinois, receiver of the bank, pay one of the assets of the bank to the  
bank on his successor, pay one of the assets of the bank to the  
Savings Bank remaining in his possession to which, in 1939, the  
petitioner, in the course of administration of the bank of the  
(\$10,000) thousand dollars which was the sum of the assets of the  
able fee for the services rendered by petitioner, and for the  
sum of seven hundred thirty-two dollars and forty-five cents  
(\$732.45) as and for receiver's fees herein." The force of this  
provision of the decree is dependent upon the exercise of discretion

~~-X~~

by the state auditor. It is unlimited as to time and makes no provision for a final determination. It is conceded by both parties that the auditor has steadfastly refused to approve the allowance of fees, leaving the decree unenforceable. Uretz's counsel argue, however, that the provision of the decree, making it "subject to such approval," should be held to be superfluous. At the outset of the hearing before the master, the receiver's counsel called the master's attention to the fact that a similar petition had been filed by Uretz in People v. Humboldt State Bank, circuit court case No. B-221,781, and that the master to whom that petition had been referred reported that Uretz was not entitled to fees under the statute, and that the chancellor entered a decree denying the petition. Uretz's counsel then advised the master that the same question had been raised before the chancellor in this proceeding, who had overruled the point, stating that where the court's receiver or the auditor of public accounts has submitted himself to the jurisdiction of the court, "that the administration of the bank proceeds under a court of chancery." The receiver's counsel conceded that the chancellor had so expressed himself the first time the matter was called to his attention, but that subsequently he made the following observation: "Even if I gave you a decision in this case, I don't know what good it would do, unless the auditor of public accounts approved it, and he has not done so, and I think you should go and see the auditor of public accounts and see what he does." In reply to these suggestions the master ruled that he would take proof, and later rule on the question of law and in his report he resolved the point in favor of petitioner, as hereinbefore set forth. It is evident that the chancellor had some doubt as to his power to authorize the payment of fees, but the conditional provision in the decree, making the payment subject to the approval of the auditor of public accounts, was nevertheless embodied in the decree.

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The decree as entered fails to "ascertain and fix with definiteness and certainty the rights and liabilities of the respec-



tive parties to the proceedings upon which it is founded, so as to furnish a guide and protection to the ministerial officers of the court who may be charged with its execution," and is therefore unenforceable. (5 Encyclopedia of Pleading and Practice, p. 1063.) In this connection it should be noted that the auditor of public accounts was a party to the proceeding. Nevertheless, the decree does not require him to do anything except to exercise his own discretion, and he exercised it by refusing to approve the payment. Courts of this state have from time to time held that decrees of this nature cannot be enforced. (Pennsylvania Co. v. Bond, 99 Ill. App. 535; Hards v. Burton, 79 Ill. 504; Cowan v. Kane, 211 Ill. 572.)

Aside from the foregoing considerations, however, we think a court of equity has no general equity jurisdiction over insolvent corporations in liquidation proceedings, except as provided by statute, and then only to the degree provided. In People ex rel. Barrett v. Shurtleff, 353 Ill. 248, the Supreme Court of this state interpreted the banking act as conferring no jurisdiction on any court, either to appoint a receiver for a closed bank or to collect and distribute its assets, and a similar result was reached in construing the insurance liquidation act in the case of People ex rel. Ernest Palmer v. Niehaus, 356 Ill. 104, wherein the court held that the receiver appointed by the director of insurance was an executive or administrative officer, and that the duties of collecting and distributing the assets of a defunct insurance company were imposed upon an official of the executive department subject to judicial supervision by a court of equity. In People ex rel. Barrett v. West Side Trust & Savings Bank, 280 Ill. App. 308, we had occasion to review the decisions of this state and <sup>of Chicago's</sup> numerous other jurisdictions under similar statutes, and we concluded that receivers in liquidation proceedings are administrative officers and not subject to the general jurisdiction of the court except as to such supervisory powers as may be conferred on the court by statute for specified purposes. This principle of law has

...ive parties to the, ... to furnish a ... the court who ... unenforceable. (5) ... In this case ... accounts was a party to the process ... does not require ... creation, and no ... Courts of this state have ... this nature cannot be enforced. ... App. 535; ... aside from the ... a court of equity has no general ... corporations in liquidation ... and then only to the ... Shumfield, 353 Ill. 448, ... the banking act as ... appoint a receiver for a ... its assets, and a ... since liquidation act in the ... Michigan, 350 Ill. 104, ... appointed by the director of ... trative of the ... the assets of a ... of the executive ... a court of equity. In ... Savings Bank, 280 Ill. 498, ... of this state and ... and we concluded that ... trative officers and not ... court except as to ... court by statute for ...



been consistently followed in this state. In consonance with this interpretation of the Banking Act, we held that the duties of collecting and disbursing the assets of a defunct bank were imposed upon the auditor of public accounts through the receiver appointed by him, and that the chancellor therefore had only such supervisory powers as are defined in the statute. Without enumerating them, it may be said that no provision is made for the allowance of fees to third persons who claim to be assisting the receiver in liquidating the assets. It is not even contended in this proceeding that Uretz had any contract, oral or written, with the receiver upon which his compensation could be predicated; he was rather a volunteer, working in the interest of the depositors, and if he is entitled to any compensation he must look to the depositors who employed him.

The remaining point urged by the intervening petitioner, and the theory upon which the master evidently predicated his recommendation that fees should be allowed, is that courts of equity are empowered to allow solicitors' fees to a party who has maintained a successful suit for the preservation, protection or increase of a common fund, or of common property. Counsel rely principally upon First National Bank of Chicago v. LaSalle-Wacker Bldg. Corp., 280 Ill. App. 188. That was a foreclosure proceeding wherein the bondholders' committee submitted a plan for reorganization in connection with the foreclosure sale. A considerable number of minority bondholders intervened, objected to the plan, and proposed a better plan of reorganization, which after extended hearings was held by the chancellor to be more beneficial to the bondholders as a whole, and was accordingly adopted. For their services, solicitors for the intervening bondholders were allowed a fee which the appellate court approved upon the theory that the court had general jurisdiction to consider the plan of reorganization and proposals for modification thereof, and that the services rendered by the solicitors for the intervenors resulted in the approval of a modified plan which conferred greater benefits on all the

been consistently followed in this case. In consequence of this interpretation of the statute, we held that the duties of collecting and distributing the assets of the bank were imposed upon the receiver of the insolvent bank, and the receiver appointed by him, and that the collection of assets was only such supervisory powers as are defined in the statute. In answer-  
ing them, it may be said that to hold that it is for the allow-  
ance of fees to third persons who are assisting the receiver in liquidating the assets. It is not even contained in this pro-  
ceeding that Ureta had any contract, oral or written, with the re-  
ceiver upon which his compensation could be predicated; he was  
rather a volunteer, working in the interest of the creditors,  
and if he is entitled to any compensation, it must look to the  
depositors who employed him.

The remaining point raised by the receiver is that the  
and the theory upon which the receiver was appointed is that  
receivables should be paid to the receiver, in the course of  
equity and good faith, to allow collection of the same, and the  
has maintained a successful suit for the same, and protection  
of increase of a common fund, or of recovery of property, to which it is  
principally upon the ground that it is a common fund, and that the  
280 Ill. App. 134. That was the case in the case of the  
bondholders' committee as a whole. It is not a corporation in  
connection with the receiver, and it is not a corporation or  
minority bondholders' committee, and it is not a corporation or  
posed a better plan of organization, and it is not a corporation or  
ings was held by the committee to be a corporation, and it is not a  
holders as a whole, and it is not a corporation or minority bond-  
holders for the intervention of the receiver, and it is not a corporation  
the committee could not approve of the receiver's plan of organization,  
general jurisdiction to consider and approve of the receiver's  
proposals for modification thereof, and it is not a corporation or  
by the committee for the intervention of the receiver, and it is not a corporation  
of a modified plan which concerns the receiver and the committee.

\*  
parties interested in the property, namely, the bondholders. We held in First National Bank <sup>of Chicago</sup> v. Bryn Mawr Beach Bldg. Corp., et al., 283 Ill. App. 267, that the state courts had general equitable powers to consider plans of reorganization in connection with foreclosure sales, and to either approve, reject or modify such plans.

*Chicago* This view was approved by the Supreme court in First National Bank <sup>Beach</sup> v. Bryn Mawr Bldg. Corp., 365 Ill. 409. Having such powers it would logically follow that the court also had jurisdiction as a court of equity to award fees to parties who had rendered services which resulted in benefits to the mass of bondholders, who are intended to be the principal beneficiaries of the foreclosure proceedings. There is no analogy, however, between the circumstances of that case and the intervening petitioner's claim in this proceeding. Foreclosures fall within the general jurisdiction of a court of equity, whereas liquidation proceedings have been defined and held to be <sup>of</sup> a different nature. They are administrative in character and the court has only such powers of supervision as are conferred on it by statute or as may be implied from any express powers given.

We are not disposed to doubt that Mr. Uretz rendered services for the depositors in an effort to enhance the value of the assets, but we think there is no provision in the statute nor any authority for approving the allowance of a claim for attorney's fees under the circumstances of this case. The order or decree of the circuit court is reversed and the cause is remanded with directions to dismiss the intervenor's petition.

9 ORDER OR DECREE REVERSED AND REMANDED  
( WITH DIRECTIONS. )

4 Scanlan and Sullivan, JJ., concur.

*Jahn*

parties interested in the property, namely, the shareholders, to  
held in First National Bank v. Brown, 100 Ill. 409, 23 Ill. App. 2d 111, 187, that the state courts had general jurisdiction  
powers to consider plans of reorganization in connection with fore-  
closure sales, and to either approve, reject or modify such plans.  
This view was approved by the Supreme Court in First National Bank  
v. Brown, 100 Ill. 409, 23 Ill. App. 2d 111, 187, holding that such powers it would  
logically follow that the court also had jurisdiction as a court of  
equity to award relief to parties who in reorganization proceedings which re-  
sulted in benefits to the class of shareholders, who are intended to  
be the principal beneficiaries of the reorganization proceedings. There  
is no analogy, however, between the circumstances of that case and  
the intervening petitioner's claim in this proceeding. Foreclosure  
falls within the general jurisdiction of a court of equity, whereas  
liquidation proceedings have been defined and held to be of a different  
nature. They are administrative in character and the court has only  
such powers of supervision as are conferred on it by statute or as  
may be implied from any express power given.  
We are not disposed to hold that the state courts have  
jurisdiction for the purpose in an effort to enhance the value of the  
assets, but we think this is not a proper basis for any  
authority for granting the relief sought. It is for the court's loss  
under the circumstances of this case. The court on review of the  
Circuit Court is reversed and the case is remanded with instructions  
to dismiss the intervening petition.  
Circuit Court of Appeals, Second Circuit, affirmed.  
Circuit Court of Appeals, Second Circuit, affirmed.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of February, in  
the year of our Lord one thousand nine hundred and forty-one,  
within and for the Second District of the State of Illinois:

Present -- The Hon. FRED C. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

310 I.A. 533<sup>2</sup>

BE IT REMEMBERED, that afterwards, to-wit: On  
the Opinion of the Court was filed in the Clerk's Office of said  
Court, in the words and figures following, viz:

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION  
1215 Broadway, New York, N. Y. 10020

THE NEW YORK PUBLIC LIBRARY  
ASTOR LENOX TILDEN FOUNDATION  
1215 Broadway, New York, N. Y. 10020  
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1215 Broadway, New York, N. Y. 10020

THE NEW YORK PUBLIC LIBRARY  
ASTOR LENOX TILDEN FOUNDATION  
1215 Broadway, New York, N. Y. 10020

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
FEBRUARY TERM, A. D. 1941.

|                      |   |                |
|----------------------|---|----------------|
| JAMES CONNETT,       | ) |                |
| Plaintiff-Appellee,  | ) |                |
| vs.                  | ) | Appeal from    |
|                      | ) | Circuit Court, |
| WINFIELD S. WINGET,  | ) | Peoria County. |
| Defendant-Appellant. | ) |                |

WOLFE, -- P. J.

"James Connett, the appellee, in this case, started suit in the Circuit Court of Peoria County, against Winfield S. Winget for damages which he claimed he sustained through the negligent operation of an automobile of the defendant. Winget was driving his car and Connett and one A. Y. Bartholomew were riding as passengers. The declaration consists of three counts, after the preliminary allegations, each count contains the following:

"Plaintiff further states that at said time and place he was then and there a passenger in the automobile of said defendant, at which time and place the said plaintiff and the defendant were upon an errand of business. Said defendant was under the duty to exercise ordinary care and caution for the safety of the plaintiff." Then follows the allegations of the negligent operation of the automobile by the defendant and the injuries to the plaintiff. He claims damages in the sum of \$25,000.00.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
JANUARY TERM, A. D. 1941.

|                                                     |   |                                                                                         |
|-----------------------------------------------------|---|-----------------------------------------------------------------------------------------|
| Appellant from<br>Circuit Court,<br>Teaneck County. | } | JAMES GUNN<br>Plaintiff-Defendant,<br>vs.<br>WILLIAM J. WINGET,<br>Defendant-Appellant. |
|-----------------------------------------------------|---|-----------------------------------------------------------------------------------------|

... ..

"James Gunn, the appellant, in this case, stated that in the Circuit Court of Teaneck County, against William J. Winget, damages which he claimed he sustained through the negligent operation of an automobile of the defendant. Winget was driving his car and Gunn and one J. F. Peterson were riding as passengers. The defendant's car was of three doors, after preliminary allegations, each would state the following: "William J. Winget stated that at said time and place he was then and there a passenger in the automobile of said defendant, and which time and place he said defendant was driving the car upon an errand of business. Said defendant was under the duty to exercise ordinary care and caution for the safety of the plaintiff. When he failed to do so, he was negligent in his operation of the automobile and the injury to the plaintiff. He claims damages in the sum of \$25,000.00."



"The defendant filed an answer and amended answers to the complaint. He denied all acts of negligence, and any liability whatsoever, for the damages to the plaintiff. In addition to the denial of liability, as above stated, the defendant filed an amended answer setting forth the Guest Statute, Section 58A, Chapter 95, of the Motor Vehicle Act, Revised Statutes of 1937, and charged that plaintiff at the time and place mentioned in the complaint, was riding as a guest in defendant's car. The plaintiff did not file a reply, or deny the new matter set forth in the amended answer. The case went to trial before a jury upon the complaint and answer. They found the issues in favor of the plaintiff, and assessed his damages at \$10,000.00. At the conclusion of the plaintiff's testimony, and also at the conclusion of all of the evidence, the defendant filed a motion for a directed verdict in his favor. The Court took these motions under advisement until after the jury had brought in their verdict, and then overruled the motions for a directed verdict. The defendant then entered a motion for judgment, notwithstanding the verdict, assigning numerous reasons therefor. This motion was overruled. The defendant then filed a motion for a new trial and set forth numerous reasons why this motion should be sustained, but the court overruled this motion. The defendant then filed a motion in arrest of judgment, but did not file any reasons why the judgment should be arrested. This motion was also overruled, and the court then entered judgment on the verdict, in favor of the plaintiff for \$10,000.00, and it is from this judgment that the appeal is prosecuted."



The original judgment of this Court reversing the judgment of the Trial Court (Connett vs. Winget, 303 Illinois Appellate 227,) was reversed on appeal to the Supreme Court and this cause was remanded by the Supreme Court to this Court with directions, to pass upon the assigned error by the appellant, which had not been decided by the Supreme Court. Connett vs. Winget 374 Illinois, 531. The main question is whether the plaintiff, James Connett, was riding as a guest in the car of the defendant, Winfield S. Winget, at the time of the accident in question, for which he claims damages. In the case of Thomas vs. The Currier Lumber Company, decided by the Supreme Court of Michigan, Reported in Volume 277 Northwestern Reporter, at Page 857, the Court held that a building contractor injured while riding in automobile owned and driven by salesman of company engaged in selling lumber and building supplies was not a "guest without payment for transportation" within statute providing that such guest cannot recover for injuries sustained in absence of proof of gross negligence or wilful and wanton misconduct of owner or operator of automobile, where purpose of trip was to interview president of company in respect to building materials which company desired to sell to contractor, and sale of which could not be consummated without the interview.

In the case of Piercy vs. Zeiss, a case from the District Court of Appeals of California, Reported in Volume 47, Pacific Reporter, Second Series, at Page 818, the Court decided that a woman injured in automobile collision occurring by reason of negligence of insurance agent with whom she was riding, pursuant to appointment for purpose of taking woman to her home with hope of

The original judgment of the Trial Court was reversed.

of the Trial Court (reversed), 303 F.2d 1001 (1962). The judgment was reversed on appeal to the Supreme Court and the case was remanded to the Supreme Court with instructions.

to pass upon the assigned error for the first time, which had not been decided by the Supreme Court. 303 F.2d 1001 (1962).

331. The main question in the case was whether the defendant was riding as a guest in the car of the plaintiff, which was

owned, at the time of the accident in question, or whether it was owned by the plaintiff. The Supreme Court decided in favor of the plaintiff.

decision by the Supreme Court of the United States, 303 F.2d 1001 (1962). The Supreme Court decided in favor of the plaintiff.

on the basis of the facts of the case, the Supreme Court decided in favor of the plaintiff.

by a majority of the Court, the Supreme Court decided in favor of the plaintiff.

within the scope of the plaintiff's duty of care, the Supreme Court decided in favor of the plaintiff.

and within the scope of the plaintiff's duty of care, the Supreme Court decided in favor of the plaintiff.

purpose of the plaintiff's duty of care, the Supreme Court decided in favor of the plaintiff.

building, the Supreme Court decided in favor of the plaintiff.

and sale of the building, the Supreme Court decided in favor of the plaintiff.

In the case of the plaintiff, the Supreme Court decided in favor of the plaintiff.

Court of Appeals in the case of the plaintiff, the Supreme Court decided in favor of the plaintiff.

Report, 303 F.2d 1001 (1962). The Supreme Court decided in favor of the plaintiff.

there selling her insurance, held not "guest" within automobile guest statute, but "passenger," entitled to recovery against agent, since hope of profit was benefit to agent, although woman stated before accepting ride that she could not buy insurance at that time.

In the case of Parrett et al., vs. Carothers et al., from the District Court of Appeals of California, Reported in Volume 53, of the Pacific Reporter, Second Series, at Page 1023, the Court there stated: "The distinction between a guest and a passenger, as established by the authorities, may be summarized as follows: A "Guest" is one who takes a ride for his own pleasure or on his own business without making any return to or conferring any benefit upon the driver of the car; one who is rendering value received, in whatever amount, and who gives such recompense for the ride as may be regarded as compensation therefor, that is to say, a return which may make worth while the giving of the ride, is a mere passenger and not a guest."

Our Supreme Court cited with approval the above cases, and in their opinion say: "In determining whether a person is a guest within the meaning of the "Guest statutes" in the several States, consideration is given to the person or persons advantaged by the carriage; if it confers only a benefit incident to hospitality, companionship or the like, the passenger is a guest, but if the carriage tends to promote mutual interests of both the person carried and the driver, or if the carriage is primarily for the attainment of some objective or purpose of the operator, the passenger is not a guest within the meaning of such enactments."



In the present case the evidence shows that the purpose of Mr. Winget's visit to Mr. Connett's place of business, was to see Connett, and to make an exchange of properties, that he had had business dealings with Connett for a period of two or three months before the accident; that the business was with reference to the house at 405 Stanford Street; that on December 14, 1936, when the accident happened, he had Connett's property on Stanford Street listed for sale. We think the evidence clearly shows that the purpose of the visit of Connett, Winget and Bartholomew to the property where the accident occurred, was for the purpose of inducing Connett to trade his property for the property listed by Bartholomew, and all three of the parties were interested in the trade. It is our conclusion that at the time of the accident in question, Connett was not riding as a guest in the automobile of the defendant, but was merely a passenger.

It is insisted by appellant that the Court erred in admitting photographs which were introduced in evidence by the plaintiff, as showing the conditions of the scene where the accident happened. It was also argued at considerable length whether the car did, or did not go over the embankment. It seems to us that it is immaterial whether the car, after Connett jumped out of it, went over the embankment or not. The accident to Connett had happened before this time. We do not think the Court erred in allowing the photographs to be admitted in evidence.

Whether the defendant was guilty of negligence as charged in plaintiff's complaint, and whether the plaintiff was guilty of contributory negligence, which contributed to the accident in





question, were ones for the jury to decide. The jury has decided in favor of the plaintiff, and we cannot say that their findings are against the manifest weight of the evidence.

Complaint is made by appellant that it was error to refuse to give their instruction No. 7. A reading of the refused instruction No. 7, discloses that the law, as stated in that instruction, is not the theory upon which the defendant based his defense, and is in conflict with defendant's given instruction No. 12, which was the theory upon which the defendant relied at the time of the trial. The two instructions are inconsistent, and the Court did not err in refusing to give instruction No. 7.

Complaint is also made in regard to the Court's refusal to give defendant's instruction No. 4. The substance of this instruction was covered by other instructions given on behalf of the defendant. The appellant also claims that it was reversible error to refuse his instruction No. 4, because instruction No. 1, given on behalf of the plaintiff, failed to inform the jury that before the plaintiff can recover, he must prove his case by a preponderance of the evidence. We do not think the instruction is subject to this criticism. The instruction did not direct a verdict, and in several other instructions given on behalf of the defendant, the law is clearly stated that, before the plaintiff can recover, he must prove his case by a preponderance of the evidence. We find no merit in the objection to the refused instructions.

In the original brief filed by appellant, it is stated that the damages are excessive, and not based upon competent evidence, and the finding as to damage, is against the manifest weight of the evidence. An examination of the record discloses that the

question, were ones for the jury to decide. The jury has decided in favor of the plaintiff, and we cannot say that their findings are against the manifest weight of the evidence.

Complaint is made by appellant that it was error to refuse to give their instruction No. 7. A reading of the refused instruction No. 7, discloses that the law as stated in that instruction, is not the theory upon which the defendant based his defense, and is in conflict with defendant's given instruction No. 12, which was the theory upon which the defendant relied at the time of the trial. The two instructions are inconsistent, and the Court did not err in refusing to give instruction No. 7.

Complaint is also made in regard to the Court's refusal to give defendant's instruction No. 1. The substance of this instruction was covered by other instructions given on behalf of the defendant. The appellant also said that it was reversible error to refuse the instruction No. 1, because instruction No. 1, given on behalf of the plaintiff, failed to inform the jury that before the plaintiff can recover, he must prove his case by a preponderance of the evidence. We do not think the instruction is subject to this criticism. The instruction did not direct a verdict, and in several other instructions given on behalf of the defendant, the law is clearly stated that before the plaintiff can recover, he must prove his case by a preponderance of the evidence. It is also noted in the instruction that the burden of proof rests upon the plaintiff. In the original brief filed by appellant, it is stated that the charges are excessive, and not based upon competent evidence, and the finding as to damages is against the manifest weight of the evidence. An examination of the record discloses that the

plaintiff was seriously and permanently injured. A just amount to be paid for the damage he sustained, was a question for the jury to determine from the evidence. By their verdict they found that this was \$10,000.00. While this seems to be a very liberal allowance for the injuries the plaintiff sustained, we cannot say that it is so excessive that it was the result of passion or prejudice on the part of the jury, but that it reflected the better judgment of what the jurors thought the evidence showed the damage the plaintiff had sustained. The appellant in his original brief, has not seen fit to argue this assignment of error to show us wherein the verdict is excessive, therefore under our rules, the point is considered waived.

On the whole, we think that the defendant had a fair trial and the verdict of the jury and the judgment of the Court is hereby affirmed.

X  
Affirmed.



STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



310 I.A. 534<sup>1</sup>

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of February, in the year of our Lord one thousand nine hundred and forty-one, within and for the Second District of the State of Illinois:

- Present -- The Hon. FRED G. WOLFE, Presiding Justice  
Hon. BLAINE HUFFMAN, Justice  
Hon. FRANKLIN R. DOVE, Justice  
JUSTUS L. JOHNSON, Clerk  
E. J. WELTER, Sheriff

---

BE IT REMEMBERED, that afterwards, to-wit; On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION  
455 FIFTH AVENUE  
NEW YORK, N. Y. 10018

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION

455 FIFTH AVENUE

NEW YORK, N. Y. 10018

THE NEW YORK PUBLIC LIBRARY

THE NEW YORK PUBLIC LIBRARY  
ASTOR LENOX TILDEN FOUNDATION  
455 FIFTH AVENUE  
NEW YORK, N. Y. 10018

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION

455 FIFTH AVENUE



IN CASE  
APPELLATE COURT - ILLINOIS,  
SECOND DISTRICT.

TO THE FEBRUARY TERM, A. D. 1941.

BAIRD-SWANNELL, INCORPORATED,  
LLOYD DENTON, AILENE DOHERTY,  
PHILLIP LOWEY, WILLIAM HARRIS,  
JOE GIROUX and GILBERT MILLS,  
Plaintiffs-Appellees,  
  
vs.  
  
ANTHONY PARISH, Treasurer of Town-  
ship 31, Range 14 East of the  
Second P. M., Kankakee County,  
Illinois, OTTO LARSON, DEVIE FLEMING,  
GORA NICHOLS, SADIE YEATES and LOUIS  
LEGACY,  
Defendants-Appellants.

Appeal from the  
Circuit Court of  
Kankakee County.

WOLFE, -- P. M.

The appellees filed a petition for writ of mandamus in the Circuit Court of Kankakee County, which is as follows: "Petitioners, Baird-Swannell, Inc., Lloyd Denton, Ailene Doherty, Phillip Lowey, William Harris, Joe Giroux and Gilbert Mills, by H. H. Whittemore and Charles W. Kirtz, their attorneys, show: (1) That petitioners are owners and holders of warrants or vouchers issued by the Board of Directors of School District No. 38 of Kankakee County, as follows:

1910

17

1. The first step is to identify the problem.
 2. The second step is to define the problem.
 3. The third step is to analyze the problem.
 4. The fourth step is to develop a solution.
 5. The fifth step is to implement the solution.
 6. The sixth step is to evaluate the solution.
 7. The seventh step is to monitor the solution.
 8. The eighth step is to maintain the solution.
 9. The ninth step is to improve the solution.
 10. The tenth step is to document the solution.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED  
DATE 08-14-2001 BY 60322 UCBAW/SJS

 $\mu \approx 10^{-3}$ 

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

[illegible][illegible]

| Name of Holder       | Date of Issue | Amount |
|----------------------|---------------|--------|
| Baird-Swannell, Inc. | Nov. 18, 1939 | 653.50 |
| Baird-Swannell, Inc. | Oct. 31, 1939 | 195.64 |
| Eloyd Denton         | Dec. 12, 1939 | 2.10   |
| Allene Doherty       | Dec. 7, 1939  | 1.45   |
| Phillip Lowey        | Dec. 12, 1939 | 9.00   |
| William Harris       | Dec. 12, 1939 | 70.00  |
| Joe Giroux           | Dec. 9, 1939  | 12.50  |
| Gilbert Mills        | Dec. 12, 1939 | 5.40   |

"(2) That said warrants were issued by the Board of Directors of said School District, signed by Richard Zimmerman, president, and Ward T. Mills, clerk, and directed to the defendant Anthony Parish, Township Treasurer, to be paid; that said warrants were duly delivered by said Board to the petitioners.

"(3) That said Anthony Parish is the duly appointed, qualified and acting Township Treasurer of said Town.

"(4) That said Board has duly levied, appropriated and collected as taxes certain sums of money, which have been placed in the treasury in two funds: educational fund and building fund; that there is now and has been for some time sufficient money in said funds to pay the warrants or vouchers.

"(5) That all of said vouchers were issued by said Board for legal purposes and for which said District became liable to pay.

"(6) That said Anthony Parish unlawfully and wrongfully refused and still refuses to cash said warrants, which are made payable at the Parish Bank & Trust Company in Mokenca, Illinois, and where petitioners presented said warrants for payment.

"Pray for a writ of mandamus directed to said Anthony Parish commanding him forthwith to pay and cash the warrants or vouchers above described." The petition was verified and contained a request for summons.



The defendant, Parish, filed his answer, which is as follows: "Admits that petitioners are holders of warrants described in complaint, but has no knowledge as to whether said warrants were issued by said Board of Directors and delivered to petitioners.

"Admits the statements contained in paragraphs 3 and 4 of complaint, and denies facts alleged in paragraph 5 thereof.

"Admits he refused to cash said warrants, but denies that he did so unlawfully or wrongfully, and states that at the time said warrants were presented to him for payment certain litigation was pending in this court over the legality of a certain contract entered into between Baird-Swannell, one of the plaintiffs herein, and the Directors of said District; and that an injunction was issued by this Court in connection with said litigation restraining the Directors from proceeding under the terms of said contract, which injunction is still in full force and effect, and that at the time said warrants were presented for payment to this defendant he was unable to ascertain whether said warrants were issued and delivered in connection with said contract.

"That because of his uncertainty of the legality of said warrants, defendant wrote to the Superintendent of Public Instruction of the State of Illinois for advice pertaining to the order issued to Baird-Swannell in the amount of \$653.50. And this defendant was directed by said Superintendent, in his letter to this defendant, dated November 22, 1939, as follows: "If in your opinion the board is attempting to do indirectly what they could not do directly I would advise that you refuse to honor the order until such time as the Court directs you to do so." That defendant stands ready and willing to pay any of said warrants or vouchers that the Court may direct paid." This answer was verified.

[illegible]

Otto Larson, Dovie Fisher, Cora Nichols, Sadie Yeates and Louis Legacy were granted leave to intervene. These defendants filed their answer, which is as follows: "They admit that petitioners are the owners and holders of certain purported warrants or vouchers, but deny that said warrants or vouchers so held by said petitioners were duly and legally issued by the Board of Directors of School District No. 38.

"Deny the allegations of paragraph 2 of the complaint.

"Admit the allegations of paragraph 3 of the complaint.

"Aver that they have no knowledge sufficient to form a belief as to the allegations of paragraph 4.

"Deny the allegations of paragraph 5.

"Admit that said Anthony Parish has refused to cash said warrants, but deny that the said refusal on his part is unlawful and wrongful, but on the contrary, that petitioners do not hold legal warrants duly and regularly issued by the board of directors of said school district, and that said school treasurer is without authority in law to honor same by paying them with the funds of said district." This answer was also verified.

The case was tried before the Court without a jury who found that the vouchers in question were issued by the Board of Directors for legal purposes, and that said Anthony Parish, Treasurer as aforesaid, unlawfully and wrongfully refused to cash said warrants, and issued the writ of mandamus, as prayed, to compel the said Anthony Parish, Treasurer as aforesaid, to pay said warrants.

It is from this judgment that the appeal is prosecuted. It is insisted that the vouchers in question were issued for contracts by the directors of the school district, in violation of the injunction which has heretofore been issued by the Circuit Court of Kankakee County, and that this Court has held the contract to be void.

Other persons, such as the... Louis Legay was... filled with... elements are the... or otherwise, but they... said positions were... Directors of... Inc.

"They the... "And the... "Even that they have no... as to the... "When the... "Admit that... but they that the... but on the... duty and... distinct, and... law to... This answer... The case... that the... some for... as the... untrained, and... said... It is... included that... which are... County, and...



Yeates vs. School Directors 305 Ill. App. 164. An examination of that opinion discloses that this Court did not hold that the contracts for repairs and furnishings, as represented by the vouchers in the present case, were illegal and void, but only held that the building of the addition to the schoolhouse was unnecessary, and the Trial Court should have enjoined the board of directors from adding the additional room to their present school building.

School directors are invested by law with a large discretion in all matters pertaining to the management of schools. With the discretionary powers of such officers, Courts have no rightful authority to interfere, unless there has been an abuse of such discretion, as would work a palpable injustice or injury. *Powell vs. Board of Education* 97 Ill. 375. Should a Court determine that the improvements in question were not necessary, it would exercise a control, which belongs to the board of directors, and which would be an unwarranted interference with the discretion of the board. We think the Court properly held that these vouchers were issued by the board of directors for legal purposes, and that the same should be paid.

The order for the writ of mandamus, appealed from, is hereby affirmed.

Affirmed.



STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



9219  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of February, in  
the year of our Lord one thousand nine hundred and forty-one,  
within and for the Second District of the State of Illinois:

Present -- The Hon. FRED G. WOLFE, Presiding Justice

Hon. BLAINE HUFFMAN, Justice

Hon. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

E. J. WELTER, Sheriff

310 I.A. 534<sup>2</sup>

---

BE IT REMEMBERED, that afterwards, to-wit: On  
the Opinion of the Court was filed in the Clerk's Office of said  
Court, in the words and figures following, viz:

Figure 1. The effect of the concentration of the *Agrobacterium* strain on the transformation efficiency of *Agrobacterium* strain 101. The concentration of the *Agrobacterium* strain 101 was varied from 10<sup>6</sup> to 10<sup>9</sup> cells/ml. The transformation efficiency was determined by the number of transformants per 10<sup>6</sup> cells of the *Agrobacterium* strain 101. The data are the mean ± SD of three independent experiments.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the proposed amendments to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which were adopted by the General Assembly of the United Nations in December 1979.

$\frac{d}{dt} \left( \frac{\partial L}{\partial \dot{x}} \right) = \frac{\partial L}{\partial x}$

1. *Pharmaceuticals* (1997) 10, 101-102.

1990年12月15日

*Journal of Management Education* 26(9)p.1078-1090

1. *Phragmites australis* (Cav.) Trin. ex Steud.

1. *Handwritten text in a cursive script, likely a letter or document, with some words underlined.*

Figure 1. The effect of the concentration of the *Agaricus bisporus* spores on the growth of *Agaricus bisporus* on the substrate.

where  $\mathbf{A} = \mathbf{A}(\mathbf{r}, \mathbf{r}', t)$  is the Green's function of the wave equation,  $\mathbf{r}$  and  $\mathbf{r}'$  are the position vectors of the observation point and the source point, respectively, and  $\mathbf{r}_0$  is the position vector of the origin of the coordinate system.

3.  $\lim_{n \rightarrow \infty} \frac{1}{n} \sum_{k=1}^n \frac{1}{k} = \ln 2$  (18)

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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October Term, A. D. 1940

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WILLIAM H. MURPHY

Appellant

v.

Jarvis Chevrolet Company,  
a corporation.

Peoria Journal-Transcript,  
Inc., a Corporation; and

Earl Johnson, doing business  
as Johnson's Sales & Service.

Appellees.

SARAH DARGEL

Appellant

v.

Jarvis Chevrolet Company,  
a corporation.

Peoria Journal-Transcript,  
Inc., a Corporation; and

Earl Johnson, doing business  
as Johnson's Sales & Service.

Appellees.

Appeal from Circuit  
Court of Peoria County.

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DOVE, J.

On September 27, 1937, William H. Murphy and Sarah Dargel  
filed their separate complaints in the Circuit Court of Peoria County

IN THE

APPELLATE COURT OF THE DISTRICT

OF THE DISTRICT OF COLUMBIA

October Term, 1937

WILLIAM W. MURPHY

Appellant

v.

Larvis Chevrolet Company,  
a corporation.

Georgia Journal-Transcript,  
Inc., a corporation; and

Earl Johnson, doing business  
as Johnson's Sales & Service.

Appellees.

ARLAN BARONI

Appellant

v.

Larvis Chevrolet Company,  
a corporation.

Georgia Journal-Transcript,  
Inc., a corporation; and

Earl Johnson, doing business  
as Johnson's Sales & Service.

Appellees.

ARLAN BARONI  
Appellant

DOVE, J.

On September 27, 1937, William W. Murphy and Arlan Baroni

filed their separate complaints in the District Court of the District of Columbia.



against Jarvis Chevrolet Company, a corporation, Peoria Journal-Transcript, Inc., a corporation, and Earl Johnson, doing business as Johnson's Sales & Service, to recover for personal injuries alleged to have been sustained by them on August 3, 1936. The defendants answered and the suits, by agreement of the parties, were consolidated for trial. At the close of the evidence offered upon the part of the plaintiffs, the jury, in obedience to a peremptory instruction, returned verdicts finding all of the defendants in each suit not guilty, and from the appropriate judgments rendered thereon the plaintiffs have appealed.

The evidence tended to prove, among other things, that on the afternoon of August 3, 1936 a so-called "Soap Box Derby" was held at the western edge of the city of Peoria on a portion of State Route No. 8, U. S. Route No. 124, which is a paved public highway. This derby was an annual affair and upon this occasion was sponsored by the defendants. The contestants were boys, and their racing vehicles were homemade automobiles, momentum propelled, and each approximately forty-five inches long, eighteen inches wide, thirty inches high and without any power driving mechanism. With their drivers, each machine weighed approximately two hundred fifty pounds and attained a speed as high as thirty miles per hour at the finish line. Prior to the race the contestants were required to have their machines inspected by a mechanic employed by the Jarvis Chevrolet Company, one of the defendants, and by others designated by the sponsors, to see that they conformed to the rules and regulations governing the contest. The location where the race was held was known as Farmington Road Hill, and the race course was down hill in a westerly direction. As the contestants started at



the top of the hill, policemen on motorcycles preceeded them down the course which was a concrete slab forty feet wide, one thousand feet long and marked into four lanes. The three lanes on the northerly side were used by the contestants in racing and the fourth lane which was on the southerly side of the slab was used by the racers in returning to the top of the hill after they had finished the course. Previous to the time the racers started, this road way, for its entire length and width was closed to traffic by the state police, and a large concourse of people had assembled to witness the races and were standing on the earthen shoulders adjacent the cement slab on both sides of it or on the edge of the slab and some were standing on the pavement near and beyond the finish line. Near the finish line at the bottom of the hill, there was a wooden horse or barricade somewhat larger than an ordinary horse used by a carpenter. It was about ten feet long and about three feet high and had been placed lengthwise along the northerly edge of the slab. Some of the officials connected with the races were standing on the pavement in front of it, that is, on the south side of it, and on the edge of the pavement behind this wooden horse the plaintiffs were standing and had observed, from this position, several races. During one of the races Frank Robertson, a contestant, was steering his car down the hill in the northern lane nearest the barricade behind which the plaintiffs were standing. The Robertson car hit the legs of the barricade and the car turned to the right and struck the plaintiffs, inflicting the injuries to recover for which these suits were instituted.

The complaints charged, among other things, that the defendants sponsored and conducted these races for the entertainment of the general public including the plaintiffs, that they invited and

the top of the hill, policemen on motorcycles proceeded then down the course which was a concrete slab forty feet wide, one thousand feet long and marked into four lanes. The three lanes on the northerly side were used by the contestants in racing and the fourth lane which was on the southerly side of the slab was used by the racers in returning to the top of the hill after they had finished the course. Previous to the time the racers started, this road way, for its entire length and width was closed to traffic by the state police, and a large concourse of people had assembled to witness the races and were standing on the eastern shoulder adjacent the concrete slab on both sides of it or on the edge of the slab and some were standing on the pavement near and beyond the finish line. Near the finish line at the bottom of the hill, there was a wooden horse or barricade somewhat larger than an ordinary horse used by a carpenter. It was about ten feet long and about three feet high and had been placed lengthwise along the northerly edge of the slab. Some of the officials connected with the races were standing on the pavement in front of it, that is, on the south side of it, and on the edge of the pavement facing the wooden horse the plaintiffs were standing and had observed, from this position, several races. During one of the races Frank Robertson, a contestant, was approaching the top of the hill in the northerly lane nearest the barricade behind which the plaintiffs were standing. The Robertson car hit the legs of the barricade and the car turned to the right and struck the plaintiffs, resulting in injuries to recover for which those suits were instituted.

The complaint charged, among other things, that the defendants sponsored and conducted these races for the entertainment of the general public including the plaintiffs, that they invited and

urged their attendance and it became the duty of the defendants to exercise reasonable care to provide a safe place from which the plaintiffs might witness these races; that the defendants negligently and carelessly neglected and refrained from exercising reasonable care in providing a safe place for the plaintiffs to witness these races, and as a direct result of said negligent and careless conduct the plaintiffs were injured. The complaints also alleged that the defendants negligently and carelessly failed to erect and maintain a suitable barricade between the track and the space adjacent thereto provided for the plaintiffs to witness the races as invitees of the defendants and charged that as a direct result of their negligence in so failing to erect and maintain such a barricade the plaintiffs were injured. The theory of counsel for the plaintiffs is that the defendants sponsored and conducted these races and were in control of the portion of the highway used as a race course; that the plaintiffs were invitees of the defendants to attend these races there held; that the defendants represented to the plaintiffs that every precaution (including the placing of ropes and barriers at the finish line) would be taken to insure their safety; that the defendants negligently failed to exercise reasonable care to provide a safe place from which the plaintiffs could witness these races and that as a direct result thereof they were injured.

Counsel for all the defendants, insist that the evidence does not disclose that they invited the plaintiffs or anyone else to attend these races, and on behalf of Earl Johnson and the Jarvis Chevrolet Company it is insisted that there is no evidence which would justify any finding that they had any connection with prompting or sponsoring these races. Counsel for all the defendants insist

urged their attendance and it became the duty of the defendants to exercise reasonable care to provide a safe place from which the plaintiffs might witness these races; that the defendants negligently and carelessly neglected and withheld from exercising reasonable care in providing a safe place for the plaintiffs to witness these races, and as a direct result of said negligent and careless conduct the plaintiffs were injured. The defendants also alleged that the defendants negligently and carelessly failed to erect and maintain a suitable barrier between the track and the space adjacent thereto provided for the plaintiffs to witness the races as invitees of the defendants and that as a direct result of their negligence in so failing to erect and maintain such a barrier the plaintiffs were injured. The theory of counsel for the plaintiffs is that the defendants negligently caused these races and were in control of the situation in which the plaintiffs were injured and that the plaintiffs were injured as a result thereof. Counsel for the defendants urged that these races were held; that the plaintiffs were seated so near the track that they were in a position to witness the races and to witness the same without the aid of a barrier or other protective device; that the defendants were not negligent in providing a safe place for the plaintiffs to witness these races and that as a direct result thereof they were injured.

Counsel for the plaintiffs stated that the evidence was not disclosed that they had a right to witness the races and to attend these races, and as a result of said negligence the plaintiffs were injured. It is stated that these races were held and that the plaintiffs were injured as a result thereof. It is further stated that the plaintiffs were injured as a result thereof.

that there is no evidence in the record which tends to prove any negligence upon the part of any of the defendants or that the plaintiffswere in the exercise of ordinary care for their own safety, and insist that the risk of being injured was assumed by the plaintiffs and by all other spectators who attend such races and that the trial court was, therefore, warranted in instructing the jury to find the defendants not guilty.

*Jerrell v. Harrisburg Fair and Park Assn.* 215 Ill. App. 273 was an action brought by one who had paid an admission fee to enter a fairground and while watching an automobile race there conducted was injured by one of the racing cars which left the track and ran against her. It was insisted that the contestants were in no way subject to the direction of the defendant and that it had no control over them and even though one of the contestants was negligent and the plaintiff injured, the defendant would not be liable. In that case it appeared that the defendant was in possession of the fairground and offered a prize of \$500.00 to the winner of the contest, and had invited the public to attend and charged an admission fee therefor. In sustaining a judgment rendered in favor of the plaintiff, the appellate court, after stating that the rule in this class of cases was stated by the supreme court in *Hart v. Washington Park Club*, 157 Ill. 9 continued: "The appellant (defendant) was giving an exhibition on grounds in its possession. To secure attractions it had offered a prize to the successful contestant. It invited the public to attend and charged an admission fee of 25 cents. This is not different, so far as the public is concerned, from hiring attractions and paying each for their work. It is a fact that many attractions are given in a peculiar manner entirely under the control of the person in charge thereof, and a





person employing such an attraction would have no control whatever over the manner in which the attraction would be staged, yet a person employing such an attraction cannot escape liability by saying the person acts independently. The person employing the attraction is giving the exhibition."

Hart v. The Washington Park Club, Supra, was an action brought by a spectator at a racing exhibition against the club sponsoring the exhibition to recover damages for injuries sustained by being struck by a "run-away" horse. The declaration did not allege that the horse which caused the injury was under the management and control of the defendant or its servants. The court held the declaration obnoxious to a general demurrer and in the course of its opinion said: "If an owner or occupier of land, either directly or by implication, induces persons to come upon his premises, he thereby assumes an obligation that such premises are in a reasonably safe condition, so that the persons there by his invitation shall not be injured by them, or in their use for the purpose of which the invitation was extended."

Counsel for appellees insist that the doctrine announced by these cases does not apply to the facts disclosed by this record because none of the appellees owned or controlled the highway where this contest was staged; that they had no control over the Robertson machine which inflicted the injuries; that they did not invite the plaintiffs to stand where they were at the time they received their injuries; that the plaintiffs were both guilty of contributory negligence and had assumed the risk of the injuries sustained.

person employing such a device would have no control whatsoever over the manner in which the attraction would be secured, yet a person employing such an attraction cannot escape liability by saying the person acts independently. The person employing the attraction is giving the exhibition."

Hart v. The Washington Park Club, supra, was an action brought by a spectator at a rodeo exhibition against the club sponsoring the exhibition to recover damages for injuries sustained by being struck by a "bum-bum" horse. The declaration did not allege that the horse which caused the injury was under the management and control of the defendant in its own right. The court held the exhibition options to a general manager and in the course of the exhibition said: "If an owner or operator of land, either directly or by his agent, has not persons to come upon his premises, he thereby assumes an obligation that some persons are in a reasonably safe condition, so that the persons whose by the invitation shall not be injured by them, or in their use for the purpose of which the invitation was extended."

Counsel for appellee insisted that the doctrine was applied by those cases does not apply to the facts disclosed by this record because none of the appellants owned or controlled the machine to which this contest was staged; that they had no control over the operation machine which inflicted the injuries; that they did not invite the plaintiffs to stand where they were at the time they received their injuries; that the plaintiffs were not guilty of contributory negligence and had assumed the risk of the injuries sustained.

The evidence found in this record is that appellee, Peoria Journal-Transcript, Inc. by its representative staged these races, with the help of the other two defendants, Jarvis Chevrolet Company and Earl Johnson who were two local Chevrolet dealers. The state police and the city police were present and assisted. The two local Chevrolet dealers delivered applications to those who desired them and received them when executed. These were to be signed by the parent or guardian of the driver and these applications recited that this All-American Soap Box Derby was sponsored by the appellee newspaper, the Chevrolet Motor Company and the Chevrolet dealers in Peoria. This instrument concluded: "I hereby release the newspaper and / or Chevrolet Motor Co., and / or any other co-sponsors, from any or all liability resulting from any accident that might occur." The evidence is further that these dealers contributed prizes for the winners and all the evidence tends, at least, to establish that these races were sponsored and staged by all the appellees as a business promotional scheme and that the race course at the time the injuries were inflicted upon appellants was under their control. At that time it was not being used by the public as a public highway but was closed to ordinary and usual traffic and to those who were there at the invitation of appellees, appellees assumed an obligation that the premises were in a reasonably safe condition.

These suits are not directed at appellees under the doctrine of respondeat superior. It is not charged that Robertson, the driver of the car which caused the injuries to the plaintiffs, was the agent or servant of the defendants or any of them but the charge is that defendants promoted and sponsored these races, that plaintiffs were there in attendance at the invitation of the defendants, that the

The evidence found in the rooming house at 100 West 12th Street, New York City, on the night of the murder of Dr. Martin Luther King, Jr., is being reviewed by the New York City Police Department. The police are also reviewing the evidence found in the rooming house at 100 West 12th Street, New York City, on the night of the murder of Dr. Martin Luther King, Jr., which was found in the rooming house at 100 West 12th Street, New York City, on the night of the murder of Dr. Martin Luther King, Jr.

defendants, therefore, assumed the duty of protecting their invitees from known dangers incident to such races. The doctrine of assumption of risk has no application to a case of this nature. The doctrine of assumption of risk arises from the relation of master and servant and does not constitute a defense where that relation does not exist between the parties. *Hendren v. Hill*, 131 Neb. 163: 267 N. W. 340.

The liability of appellees depends on whether appellants sponsored and conducted these races, whether they were guilty of the negligence charged and whether appellants were free from contributory negligence. These are all questions of fact for the jury. In our opinion appellants were entitled, upon the evidence appearing in this record, to have the issues raised by the pleadings submitted to a jury and for the error in directing verdicts of not guilty the judgments appealed from will be reversed and the causes remanded.

Reversed and remanded.

defendants, therefore, assumed the duty of protecting their in-  
vited from known dangers incident to such races. The doctrine of  
assumption of risk has no application to a case of this nature.  
The doctrine of assumption of risk arises from the relation of master  
and servant and does not constitute a defense where that relation  
does not exist between the parties. (Henderson v. Mill, 131 Neb. 163)

267 N. W. 2d 340.

The liability of sponsors depends on whether appellants  
sponsored and accepted these races, whether they were guilty of  
the negligence charged and whether appellants were free from  
contributory negligence. There are all questions of fact for the  
jury. In our opinion appellants were negligent, that the evidence  
appearing in this record, do have the burden raised by the appel-  
lants submitted to a jury and for the error in admitting evidence  
of not guilty the judgment appealed from will be reversed and  
the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and  
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby  
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,  
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said  
Appellate Court, at Ottawa, this \_\_\_\_\_ day of  
\_\_\_\_\_ in the year of our Lord one thousand nine  
hundred and thirty-\_\_\_\_\_

---

*Clerk of the Appellate Court*





41591

WILLOUGHBY TOWER BUILDING  
CORPORATION, a Corporation,  
Appellant,

v.

GEORGE ENZINGER and CECIL F.  
BENNETT,  
Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

310 I.A. 535

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover \$962, claimed to be a balance due on an agreement by defendants to repay to plaintiff the cost of making certain alterations in office space to be leased by plaintiff to a company in which defendants were interested. Defendants claim this agreement was only a guarantee for the payment of rent and that subsequently, by agreement, the lease was terminated, thus relieving the guarantors from their obligations. Upon trial by the court defendants' view prevailed and judgment was against plaintiff, which appeals.

The Dyer-Enzinger Co., Inc., in April, 1931, occupied space on the 22nd floor of plaintiff's building under a written lease at a monthly rental of \$450 up to March, 1932, and thereafter \$475 a month until the expiration of the lease on September 30, 1934; the lessee company wished to be released from its obligations under this lease and, wishing to occupy less expensive space in plaintiff's building, proposed that plaintiff cancel its 22nd floor lease and give it space on the 20th floor at a reduced rental - the term of the new lease to be the same, but the new rental to be \$275 a month. In order to fit the new space on the 20th floor for occupancy it was estimated it would be necessary to expend \$1300 for alterations. Plaintiff refused to enter into an agreement to cancel the lease to the 22nd floor and to make a new lease of space on the 20th floor unless defendants would agree to pay plaintiff the cost of making these alterations; but if the lessee would pay the rental for the full term of the new lease, plaintiff would deduct these costs from the rent in monthly installments. Thereupon the agree-

WILLOUGHBY TOWER BUILDING  
CORPORATION, a Corporation,  
Appellant,  
v.  
GEORGE ENNINGER and CECIL F.  
BENNETT,  
Appellees.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

3101A.585

MR. JUSTICE MESSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover \$982, claimed to be a balance due on an agreement by defendants to repay to plaintiff the cost of making certain alterations in office space to be leased by plaintiff to a company in which defendants were interested. Defendants claim this agreement was only a guarantee for the payment of rent and that subsequently, by agreement, the lease was terminated, thus relieving the guarantors from their obligations. Upon trial by the court defendants' view prevailed and judgment was against plaintiff, which appeals.

The Dyer-Enninger Co., Inc., in April, 1931, occupied space on the 32nd floor of plaintiff's building under a written lease at a monthly rental of \$450 up to March, 1932, and thereafter \$475 a month until the expiration of the lease on September 30, 1934; the lessee company wished to be released from its obligations under this lease and, wishing to occupy less expensive space in plaintiff's building, proposed that plaintiff cancel the 32nd floor lease and give it space on the 30th floor at a reduced rental - the term of the new lease to be the same, but the new rental to be \$275 a month. In order to fit the new space on the 30th floor for occupancy it was estimated it would be necessary to expend \$1300 for alterations. Plaintiff refused to enter into an agreement to cancel the lease to the 32nd floor and to make a new lease of space on the 30th floor unless defendants would agree to pay plaintiff the cost of making these alterations; but if the lessee would pay the rental for the full term of the new lease, plaintiff would deduct these costs from the rent in monthly installments. Thereupon the agree-

ment which is the subject matter of this suit was reduced to writing and is as follows:

"Whereas a lease was heretofore executed and delivered by the Willoughby Tower Building Corporation, as lessor, to Dyer-Enzinger Company, Inc., a corporation for Rooms Nos. 2204, 2205, 2206 and 2207 in the Willoughby Tower Building; and

Whereas the lessee desires to have said lease cancelled and to take a lease of Rooms Nos. 2012, 2013, 2014 and 2015 in said building; and

Whereas the lessor will be required to make various additions and alterations in and to said last mentioned premises in order to make them suitable for occupancy by the lessee, and the reasonable cost of the proposed additions and alterations have been agreed upon as the sum of Thirteen Hundred Dollars (\$1300.); and

Whereas George Enzinger, Forbes M. Morrison, Edgar W. Federer and Cecil F. Bennett are interested in the business to be conducted in the premises by the lessee and have requested the lessor to make the additions and alterations and execute and deliver said proposed new lease;

Now, Therefore, it is mutually covenanted and agreed as follows:

For and in consideration of the payment of One Dollar (\$1.00) by the lessor to the lessee, and for other good and valuable considerations, the undersigned, George Enzinger, Forbes M. Morrison, Edgar W. Federer and Cecil F. Bennett have undertaken, and agreed, and do hereby undertake and agree to pay to the lessor the said sum of Thirteen Hundred Dollars (\$1300.) upon condition that the lessee shall fail to pay the rent, or any part thereof, reserved in said proposed new lease. The term of said proposed new lease is to commence on the First (1st) day of April, A. D. 1931 and will end on the Thirtieth (30th) day of September, A. D. 1934. If the lessee shall pay any part of the rent reserved in said lease, during the term of said lease, then the obligation of the undersigned to pay the said sum of Thirteen Hundred Dollars (\$1300.) shall be reduced in the same proportion that the amount of the rent paid bears to the total amount of rent reserved in said proposed new lease. If the lessee shall pay all of the rent reserved in said proposed new lease then the undersigned shall be released from their obligation to pay said Thirteen Hundred Dollars (\$1300.) or any part thereof.

In Witness Whereof the said George Enzinger, Forbes M. Morrison, Edgar W. Federer and Cecil F. Bennett have hereunto set their hands and seals this 25th day of March, A. D. 1931."

The new lease was made to the Dyer-Enzinger Co., the old lease was canceled and plaintiff expended \$1300 for the alterations; the Dyer-Enzinger Co. took possession of the new space on the 20th floor and paid rent from April 1, 1931, to and including November, 1931; the corporation defaulted in the payment of the December, 1931, rent and continued in default thereafter.

Enzinger was the controlling stockholder of the Dyer-Enzinger Co., and defendant Bennett was also a stockholder; in February, 1932, these stockholders voluntarily appointed a Mr. Passmore as liquidator of the assets of the company; Passmore made an agreement with plaintiff on May 5, 1932, adjusting the amount due on the lease up to that time and vacated the premises.

and is as follows:

"Whereas a lease was heretofore executed and delivered by the Wiloughby Tower Building Corporation, as lessor, to Edgar W. Federer and Cecil E. Bennett, a corporation for Room Nos. 2204, 2205, 2206 and 2207 in the Wiloughby Tower Building; and Whereas the lessees desire to have said lease cancelled and to take a lease of Room Nos. 2012, 2013, 2014 and 2015 in said building; and Whereas the lessor will be required to make various additions and alterations in and to said last mentioned premises in order to make them suitable for occupancy by the lessees, and the reasonable cost of the proposed additions and alterations have been agreed upon as the sum of Thirteen Hundred Dollars (\$1300.); and Whereas George Knicker, Robert M. Morrison, Edgar W. Federer and Cecil E. Bennett are interested in the business to be conducted in the premises by the lessees and have requested the lessor to make the additions and alterations and execute and deliver said proposed new lease; Now, Therefore, it is mutually covenanted and agreed as follows:

For and in consideration of the payment of One Dollar (\$1.00) by the lessor to the lessees, and for other good and valuable considerations, the undersigned, George Knicker, Robert M. Morrison, Edgar W. Federer and Cecil E. Bennett have undertaken, and agreed, and do hereby undertake and agree to pay to the lessor the said sum of Thirteen Hundred Dollars (\$1300.) upon condition that the lessees shall fail to pay the rent, or any part thereof, reserved in said proposed new lease. The term of said proposed new lease is to commence on the first (1st) day of April, A. D. 1931 and will end on the Thirtieth (30th) day of September, A. D. 1934. If the lessees shall pay any part of the rent reserved in said lease, during the term of said lease, then the obligation of the undersigned to pay the said sum of Thirteen Hundred Dollars (\$1300.) shall be reduced in the same proportion that the amount of the rent paid bears to the total amount of rent reserved in said proposed new lease. If the lessees shall pay all of the rent reserved in said proposed new lease then the undersigned shall be released from their obligation to pay said Thirteen Hundred Dollars (\$1300.) on any part thereof. In witness whereof the said George Knicker, Robert M. Morrison, Edgar W. Federer and Cecil E. Bennett have hereunto set their hands and seals this 23rd day of March, A. D. 1931."

The new lease was made to the Dyer-Bennett Co., the old lease was canceled and plaintiff expended \$100 for the alterations; the Dyer-Bennett Co. took possession of the premises on the 20th floor and paid rent from April 1, 1931, to and including November, 1931; the corporation defaulted in the payment of the rent, 1931, rent and continued in default thereafter. Defendant was the controlling stockholder of the Dyer-Bennett Co., and defendant Bennett was also a stockholder; in February, 1932, these stockholders voluntarily appointed a receiver as liquidator of the assets of the company; receiver made an agreement with plaintiff on May 4, 1932, adjusting the account on the lease up to that time and vacated the premises.

December, 1934, after the expiration of the lease a suit was filed in the Municipal court for the balance of the rent due under the lease from the Dyer-Enzinger Co.; that suit was against George Enzinger and Cecil Bennett; Bennett only was served and judgment was rendered against him by default, which was subsequently satisfied.

October, 1939, the instant suit was started under the agreement of March 25, 1931, for the cost of the alterations, plaintiff claiming a balance due of \$962.

It is clear from the evidence that in executing this agreement the parties understood they were executing an agreement covering the costs of the alterations. Enzinger testified that when the proposition to cancel the old and to make a new lease was under consideration, plaintiff told defendants that under no circumstances would the old lease be canceled and a new lease made unless certain stockholders in the company would give a personal guarantee covering the costs of the alterations. He further testified that when he and the others signed the agreement in question it was understood to be "an agreement of guarantee not of the lease but for certain alterations," and that "under the agreement to pay for the alterations I was not obligated to pay the rent."

It would be reasonable to suppose that if plaintiff advanced the costs of making the alterations for the lessee corporation, and at the same time canceled the old lease and accepted the new lease at a less rental, some agreement would be entered into to reimburse plaintiff for advancing these costs if the lessee should fail to pay rent during the full term of the lease. Otherwise plaintiff might pay for the alterations and the lessee within a short time default in the rent, leaving plaintiff to bear these costs without any compensation for making them. Defendants agreed to pay plaintiff for these costs either directly, if the lessee failed to pay rent, or out of the rent in monthly installments. The agreement was clearly a guarantee for the repayment of these costs and not for the payment of rent.

December, 1934, after the expiration of the lease a suit was filed in the Municipal court for the balance of the rent due under the lease from the Dyer-Krueger Co.; that suit was against George Krueger and Cecil Bennett; Bennett only was served and judgment was rendered against him by default, which was subsequently satisfied.

October, 1935, the instant suit was started under the agreement of March 25, 1931, for the cost of the alterations, plaintiff claiming a balance due of \$282.

It is clear from the evidence that in executing this agreement the parties understood they were executing an agreement covering the costs of the alterations. Plaintiff testified that when the proposition to cancel the old and to make a new lease was under consideration, plaintiff told defendants that under no circumstances would the old lease be canceled and a new lease made unless certain stockholders in the company would give a personal guarantee covering the costs of the alterations. He further testified that when he and the others signed the agreement in question it was understood to be "an agreement of guarantee not of the lease but for certain alterations," and that "under the agreement to pay for the alterations I was not obligated to pay the rent."

It would be reasonable to suppose that if plaintiff advanced the costs of making the alterations for the lease cancellation and at the same time canceled the old lease and accepted the new lease at a less rental, some agreement would be entered into to reimburse plaintiff for advancing these costs if the lease should fail to pay rent during the full term of the lease. Otherwise plaintiff might pay for the alterations and the lease within a short time default in the rent, leaving plaintiff to bear these costs without any compensation for making them. Defendants agreed to pay plaintiff for these costs either directly, if the lease failed to pay rent, or out of the rent in monthly installments. The agreement was clearly a guarantee for the repayment of these costs and not for the payment of rent.

Defendants argue that by the agreement between plaintiff and Passmore, the liquidator, made May 5, 1932, adjusting the amount of rent due up to that time, the lease between plaintiff and the Dyer-Enzinger Co. was surrendered and hence the guarantors were released. The evidence shows, however, that this was merely a settlement of the amount of rent due under the lease up to May, 1932, the date when the liquidator vacated the premises. The agreement did not attempt to adjust the remaining liability of the Dyer-Enzinger Co. on its lease. Plaintiff agreed to waive any lien it had upon the personal property of the lessee upon the leased premises in consideration that the liquidator should settle for the rent during the time he was in possession.

Defendants argue that by the suit brought against Enzinger and Bennett in 1934, to collect the balance of rent due on the lease, plaintiff was barred from commencing the instant suit to recover the costs of the alterations. In the complaint in that suit to collect rent the agreement of March, 1931, upon which the present suit is brought, was referred to as "a guarantee of the payment of a certain portion of the rent." We do not deem this binding upon plaintiff as to the character of the document. It was merely an admission of the execution of the document and not as to its nature. This is a question of law and its nature must be determined from the written instrument itself and the circumstances under which it was executed. The document itself shows it was a guarantee that the costs of the alterations should be repaid to the lessor.

Other points are made by defendants but they are without merit. Clearly, plaintiff had the right to bring suit upon the lease to recover rental due thereunder, and another suit upon the agreement of March 25, 1931, to reimburse plaintiff for the advances made for the alterations. The arguments made by defendants are in the main highly technical and do not convince that the essential character of the transaction is not as we have stated, namely, an agreement for the repayment of the advances for the alterations. An expression by Judge

Defendants argue that by the agreement between Plaintiff and Passmore, the liquidator, made May 5, 1932, adjusting the amount of rent due up to that time, the lease between Plaintiff and the Pyer-Enzinger Co. was surrendered and hence the Guarantors were released. The evidence shows, however, that this was merely a settlement of the amount of rent due under the lease up to May, 1932, the date when the liquidator vacated the premises. The agreement did not attempt to adjust the remaining liability of the Pyer-Enzinger Co. on its lease. Plaintiff agreed to waive any lien it had upon the personal property of the lessee upon the leased premises in consideration that the liquidator should settle for the rent during the time he was in possession.

Defendants argue that by the suit brought against Enzinger and Bennett in 1934, to collect the balance of rent due on the lease Plaintiff was barred from commencing the instant suit to recover the costs of the alterations. In the complaint in that suit to collect rent the agreement of March, 1931, upon which the present suit is brought, was referred to as "a guarantee of the payment of a certain portion of the rent." We do not deem this binding upon Plaintiff as to the character of the document. It was merely an admission of the execution of the document and not as to its nature. This is a question of law and its nature must be determined from the written instrument itself and the circumstances under which it was executed. The document itself shows it was a guarantee that the costs of the alterations should be repaid to the lessor.

Other points are made by defendants but they are without merit. Clearly, Plaintiff had the right to bring suit upon the lease to recover rental due thereunder, and another suit upon the agreement of March 25, 1931, to reimburse Plaintiff for the advances made for the alterations. The arguments made by defendants are in the main highly technical and do not convince that the essential character of the transaction is not as we have stated, namely, an agreement for the repayment of the advances for the alterations. An exception by Judge



Gary, quoted from memory, is pertinent to this case. He said: "The defendant seeks to pay an honest debt with a legal technicality."

For the above reasons the judgment of the Municipal court is reversed and judgment for plaintiff and against defendants is entered in this court for \$962.

REVERSED AND JUDGMENT FOR PLAINTIFF HERE.

O'Connor, P.J., and Matchett, J. concur.

Gary, quoted from memory, is pertinent to this case. He said: "The defendant seeks to pay an honest debt with a legal technicality."

For the above reasons the judgment of the Municipal Court

is reversed and judgment for plaintiff and against defendant is

entered in this court for \$200.

REVERSED AND JUDGMENT FOR PLAINTIFF HERE.

O'Connor, J., and Macchett, J. concur.

41591

WILLOUGHBY TOWER BUILDING  
CORPORATION, a Corporation,  
Appellant,

v.

GEORGE ENZINGER and CECIL F.  
BENNETT,  
Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

310 I.A. 852

SUPPLEMENTAL OPINION ON PETITION FOR REHEARING.

In plaintiff's claim filed December, 1934, by a former attorney, he misnamed the agreement about the alterations as "A guaranty of the payment of a certain portion of the rent" to be paid under the lease, and attached this to the statement of claim. Perhaps this misled defendant Bennett and his attorney to the conclusion that it would be expedient to permit a default judgment and payment, thinking this would satisfy all obligations of Bennett under the agreement. Plaintiff admits that it was not entitled to recover a judgment against Bennett in that suit. It is only fair, therefore, that defendants should receive credit in the present case for \$404.14, the amount of that judgment. Deducting this amount from the rent credit gives the total amount paid on this as 22.69 per cent of the total rent liability. The liability of defendants under the terms of the alteration agreement is, therefore, 77.31 per cent of \$1300, or \$1005.03. Crediting against this the judgment against Bennett of \$404.14 leaves \$600.89.

The opinion is therefore modified and the judgment for plaintiff is changed to this latter amount - \$600.89, and the petition for rehearing is denied.

OPINION MODIFIED.

WILLOUGHBY TOWER BUILDING  
CORPORATION, a corporation,  
Appellant,

v.

GEORGE WINTER AND DEEDS  
BENNETT,  
Appellees.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

SUPPLEMENTAL OPINION ON PETITION FOR REHEARING.

In plaintiff's claim filed December, 1934, by a former attorney, he misnamed the agreement about the alterations as "A Guaranty of the payment of a certain portion of the rent" to be paid under the lease, and attached this to the statement of claim. Perhaps this misled defendant Bennett and his attorney to the conclusion that it would be expedient to permit a default judgment and payment, thinking this would satisfy all obligations of Bennett under the agreement. Plaintiff admits that it was not entitled to recover a judgment against Bennett in that suit. It is only fair, therefore, that defendants should receive credit in the present case for \$404.14, the amount of that judgment. Deducting this amount from the rent credit gives the total amount paid on this as \$2,89 per cent of the total rent liability. The liability of defendants under the terms of the alteration agreement is, therefore, 77.21 per cent of \$1800, or \$1389.77. Credit against this the judgment against Bennett of \$404.14 leaves \$985.63. The opinion is so stated and the court is so charged. Plaintiff is charged to this latter amount - \$985.63, and the petition for rehearing is denied.

CLAUDE L. JONES

AT A TERM OF THE APPELLATE COURT,  
Begun and held at Ottawa, on Tuesday, the 6th day of May, in  
the year of our Lord one thousand nine hundred and forty-one,  
within and for the Second District of the State of Illinois:

Present -- the HON. FRED G. WOLFE, Presiding Justice  
HON. BLAINE HUFFMAN, Justice  
HON. FRANKLIN R. DOVE, Justice  
JUSTUS L. JOHNSON, Clerk  
E. J. WELTER, Sheriff

310 I.A. 536

=====

BE IT REMEMBERED, that afterwards, to-wit: On  
the Opinion of the Court was filed in the Clerk's Office of  
said Court, in the words and figures following, viz:



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

October Term, A.D. 1940.

|                      |   |                  |
|----------------------|---|------------------|
| HULDA ERICKSON,      | ) |                  |
|                      | ) |                  |
| Appellant            | ) | APPEAL FROM THE  |
|                      | ) |                  |
| vs.                  | ) | CIRCUIT COURT OF |
|                      | ) |                  |
| JOSEPHINE STRAKA and | ) | WILL COUNTY.     |
| JAMES STRAKA,        | ) |                  |
| Appellees.           | ) |                  |

DOVE, J.

On June 20, 1930, appellees executed several notes aggregating \$15,000.00, each note payable to bearer and due three years after date with interest to maturity at the rate of six per cent per annum, interest payable semi-annually. The interest was evidenced by coupon or interest notes attached to the several principal notes and the principal and interest was payable at the Oliver Realty Company in Joliet. Appellees also executed at this time a trust deed conveying property located at No. 656 Cass Street in Joliet to William A. Murphy, trustee, to secure the payment of these notes and interest. At or about the time of the execution of these notes appellant purchased one of them in the principal sum of \$500.00 from the Oliver Realty Company paying therefor \$500.00, and received from the Realty Company the note which she purchased.





On June 2, 1939, appellant filed her complaint at law in the circuit court of Will County against the makers of this note, alleging its execution, her ownership thereof and default in its payment. Appellees in their answer admitted the execution of the note sued on but averred that the same had been paid and discharged by a conveyance by them to Benjamin J. Benson of the Cass Street property described in the trust deed theretofore executed by them to the said William A. Murphy, trustee. The issues made by the pleadings were submitted to a jury resulting in a verdict for the defendants upon which the court rendered judgment and the plaintiff appeals.

The evidence discloses the execution by appellees of said notes and trust deed, the purchase for value of the note sued on by appellant and default in payment thereof. The evidence further discloses that in 1932 after appellees had defaulted in the payment of their interest they turned over the management of the premises covered by the deed of trust to the Oliver Realty Company, and subsequently, on March 5, 1933, they executed their warranty deed conveying the premises to Benjamin J. Benson. This deed was duly acknowledged that day and delivered by the grantors to the grantee. It recited that it was made subject to the Murphy trust deed dated June 20, 1930, securing the payment of \$15,000.00. The grantee, Benjamin J. Benson, had been engaged in the real estate, loan and insurance business for twenty years and was a member of the partnership doing business as the Oliver Realty Company. The grantors also signed and delivered to Benson the following letter, viz:



Oak Park, Illinois  
March 15, 1933

Mr. Benjamin J. Benson  
Joliet, Illinois

Dear Sir:

I have to-day conveyed to you the property described as follows (here follows a description of the real estate covered by the trust deed).

This conveyance is made with the understanding that it is to be accepted by you as trustee for the noteholders in satisfaction of a certain series of notes, aggregating the principal sum of \$15,000.00; and if, for any reason, the noteholders do not wish to accept this in liquidation of the indebtedness, then you can be discharged from all responsibility to me by returning the deed to me unrecorded. If they do accept, this letter gives you full authority to file the deed for record, and to assemble the notes and return them to me, marked cancelled, and I understand that I will have no further claim against the property of any kind or character whatsoever.

I hereby also assign all moneys heretofore collected as rental from said building by Oliver Realty Company unto you for the benefit of said noteholders.

Yours very truly,

JOSEPHINE STRAKA  
JAMES STRAKA

At this time the several notes secured by said trust deed were held by twelve persons and shortly after receiving the deed and the above letter from appellees, Mr. Benson submitted to the twelve noteholders the proposition of accepting the conveyance of the property in discharge of the indebtedness secured by the trust deed. Only five of the noteholders accepted. Appellant and six other noteholders refused to surrender their notes or accept any interest in the property covered by the trust deed, and appellees were so advised of the action of the several noteholders, and were informed that they could have their deed returned to them. Appellees, however, requested Benson to continue

Chicago, Ill.  
June 10, 1903

Mr. Benjamin J. Benson  
Chicago, Illinois

Dear Sir:

I have no day conveyed to you the property described  
as follows (here follows a description of the real estate  
covered by the trust deed).

This conveyance is made in full satisfaction of the  
debt secured by the mortgage of the property described in  
the record of a certain deed of mortgage, recorded in the  
principal and of \$2,000.00; and all, for any reason, the  
notwithstanding to not to accept this in liquidation of  
the indebtedness, then you can be discharged from all con-  
-tinuation of the debt to be discharged.  
If they do accept, this letter gives you full authority to  
life the debt for record, and to receive the money and  
return them to me, unless cancelled, and I understand that  
I will have no further claim against the property of the  
kind or character whatsoever.

I hereby also assign all money heretofore collected  
as a result of the deed of mortgage, and I hereby assign  
unto you for the benefit of said noteholders.

Yours very truly,

JOHN H. HENNING  
CHICAGO, ILL.

At this time the several notes secured by said trust deed

were held by twelve persons and another then receiving the  
debt and the above letter from Chicago, Ill. Benson admitted

to the twelve noteholders the proposition of accepting the

conveyance of the property in discharge of the indebtedness

secured by the trust deed. With five of the noteholders (excepted)

Applicant and the other noteholders were to be discharged and

notes on accept any interest in the property covered by the trust

debt, and applicant was to retain of the security of the trust

noteholders, and were informed that they could have their debt

returned to them. Applicant, however, was unable to obtain

to hold the deed and manage the property expressing the hope that perhaps all the noteholders would later agree to accept the property.

The evidence is further that the plan of obtaining a deed from appellees in exchange for a cancellation of the indebtedness evidenced by the notes did not originate with the noteholders. Mr. Benson and Mr. Anderson, both members of the partnership, doing business as the Oliver Realty Company, were the parties who first discussed the matter with appellees and none of the noteholders knew of the proposed plan until after the execution of the deed by appellees. The deed has always been in the grantee's possession and was never placed of record, and was produced by the grantee, Benson, upon the trial and tendered to appellees. The note sued on was produced by appellant at the trial and the evidence is that it has been in her possession since the time of its purchase by her shortly after its execution.

According to the testimony of appellee, James Straka, the letter dated March 15, 1933, was executed two weeks or a month after its date upon a second visit to him by Mr. Benson. He further testified that the deed, at the time of its execution, did not contain a recital to the effect that the conveyance was made subject to the trust deed executed by them on June 20, 1930, securing the payment of \$15,000.00. He further testified that at the time this deed was executed nothing was said about getting the noteholders to assent to accepting the same in satisfaction of his indebtedness to them and that while he knew the contents of this letter of March 15, 1933, he did not understand what it meant and signed it simply because Mr. Benson requested him to

to hold the deed and manage the property expressing the hope that perhaps all the noteholders would later agree to accept the property.

The evidence is further that the plan of obtaining a deed from appellees in exchange for a cancellation of the indebtedness evidenced by the notes did not originate with the noteholders. Mr. Benson and Mr. Anderson, both members of the partnership, doing business as the Oliver Realty Company, were the parties who first discussed the matter with appellees and none of the noteholders knew of the proposed plan until after the execution

of the deed by appellees. The deed has always been in the grantee's possession and was never placed of record, and was produced by the grantee, Benson, upon the trial and tendered to appellees. The note sued on was produced by appellant at the trial and the evidence is that it has been in her possession since the time of its purchase by her shortly after its execution.

According to the testimony of appellee, James Strake, one letter dated March 15, 1933, was executed two weeks or a month after its date upon a second visit to him by Mr. Benson. He further testified that the deed, at the time of its execution, did not contain a recital to the effect that the conveyance was made subject to the trust deed executed by them on June 30, 1930, securing the payment of \$5,000.00. He further testified that at the time this deed was executed nothing was said about getting the noteholders to assent to accepting the same in satisfaction of his indebtedness to them and that while he knew the contents of this letter of March 15, 1933, he did not understand what it meant and signed it simply because Mr. Benson requested him to

sign, and stated that it belonged to the deed transaction. He further testified that Mr. Benson left a copy of this letter of March 15, 1933, with him and he produced it upon the trial. Mr. Straka also testified that before this suit was instituted appellant and two other noteholders asked him to pay the notes which they held, but that he told them he did not have anything to do with the property any longer and that the Oliver Realty Company had it. The Oliver Realty Company had managed it for several years, collected the rents and paid the taxes, insurance and some interest to the various noteholders and sent several statements to appellees after the execution of the deed on March 5, 1933, which statements itemized the rents collected by it and the expenditure thereof. These statements all disclosed that the Realty Company had paid a portion of the receipts to the several noteholders for interest. Mr. Straka testified he received these statements, and on April 27, 1936, he wrote the Oliver Realty Company acknowledging the receipt of an income and expense statement, and requested the Realty Company to sell the property and pay off the outstanding indebtedness. On May 18, 1936, the Realty Company acknowledged the receipt of this letter and called the attention of Mr. Straka to the fact that the statements of income and expense disclosed that the property did not produce enough to pay operating expenses, taxes and interest and that in their opinion, the property would not sell for enough at that time to pay the amount of the mortgage and interest. On February 14, 1939, Mr. Straka wrote the Realty Company to the effect that six years before he had turned the Cass Street property over to Mr. Anderson and he thought it would take care of the loan, and as he had no money he believed it

... and at the same time ...  
... further ...  
... March 15, 1955, when ...  
... Bureau also ...  
... significant ...  
... which they ...  
... do with the ...  
... company had ...  
... several years ...  
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... March 15, 1955, ...  
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... that the ...  
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... received ...  
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... one ...  
... 15, 1955 ...  
... other ...  
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... did not ...  
... interest ...  
... company ...  
... also ...  
... same ...



would be for the best if Mr. Anderson would sell the property and pay the noteholders.

John B. Anderson testified that he was a lawyer and one of the partners of the Oliver Realty Company and was present with Mr. Benson when the deed was executed by appellees on March 15, 1933, and that at that time the proposition of executing a deed in accordance with the letter of March 15, 1933, was fully explained to appellees. His testimony fully corroborates the testimony of Mr. Benson.

Counsel for appellees in his brief states that the questions presented by this record are:- First: Was the Oliver Realty Company represented by Anderson and Benson, the authorized agents of appellant, on March 15, 1933? Second: If not, did appellant afterwards ratify and confirm the acts of these parties in procuring this deed? And third: Was the verdict of the jury sustained by the law and the evidence? In their argument counsel state that "the whole of defendants' case is made up of small details, circumstances and facts, all of which dovetailing together led the jury to the inevitable conclusion which it did reach."

We have read all the evidence as abstracted and find no evidence in this record that Anderson and Benson were the authorized agents of appellant at the time appellees executed their deed to Benson, and the only reasonable conclusion consistent with the evidence that can be arrived at is that the delivery of the deed executed by appellees was without the knowledge or consent of the noteholders and that appellees understood that its delivery was a conditional one and that appellees fully understood that their conveyance would only become effective if all

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2017 年 12 月 31 日 00:00 至 2018 年 1 月 1 日 00:00 的统计结果

1. *Abacus*

*The Journal of Law, Economics, & Organization*, V16 N1, Spring 2000, pp. 1-7  
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the noteholders agreed thereto and surrendered their notes and cancelled the indebtedness represented by their notes. This was never done. Anderson and Benson did not attempt to bind appellant or any of the other noteholders when the deed was executed by appellants and appellees so understood the transaction. There was no intention upon the part of appellees when they signed and delivered to Benson their deed to pass title by that instrument unless all the noteholders cancelled the indebtedness they held and surrendered the evidences thereof. This was not done. The deed never became effective. There is no evidence that appellant ever consented to accept any interest in the property described in the conveyance to Benson in lieu of her lien thereon by virtue of being a holder of the note sued on.

The judgment is not sustained by the evidence found in this record and it is, therefore, reversed and the cause remanded.

Reversed and remanded.

the record was signed and the record was  
cancelled and the record was cancelled by the court. The  
never done. The court did not attempt to find a  
or any of the other records when the case was  
appealed and the case was appealed as a matter of  
was no finding upon the fact of a violation of the  
delivered to the court and the court was  
the court was called to the attention of the  
and suggested the evidence was not  
been never become effective. The court  
ever concerned to accept any evidence  
in the conversation as to the fact of  
virtue of being a holder of the record.  
The court is not required to find in the  
record was in fact, however, cancelled at the

record was cancelled.

STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hercunto set my hand and affix the seal of said Appellate Court, at Ottawa, this\_\_\_\_\_day of \_\_\_\_\_in the year of our Lord one thousand nine hundred and thirty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



41560

MARIE DERANGO,

Appellee,

v.

M. RUBIN,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

310 I.A. 536<sup>2-</sup>

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries claimed to have been sustained by her through the negligence of defendant in driving his automobile. There was a jury trial, a verdict and judgment in plaintiff's favor for \$8500, and defendant appeals.

The record discloses that about 9 o'clock on the evening of March 14, 1939, plaintiff, who was then about 29 years old, had been shopping with two other women in the neighborhood of Spaulding avenue and Roosevelt road, Chicago, and as they walked north crossing Roosevelt road on the east crosswalk of the street intersection plaintiff was struck and injured by defendant's automobile which was then being driven east in Roosevelt road. She was thrown to the ground and when the automobile stopped was underneath it and it was necessary to lift it up to rescue her.

The complaint was in two counts. In the first it was alleged plaintiff was in the exercise of due care and caution for her own safety and that defendant negligently drove his automobile (1) at a speed greater than was reasonably proper having regard to the traffic and the use of the right-of-way, contrary to par. 146, §49, ch. 95-1/2; (2) that defendant omitted and neglected to sound a horn contrary to par. 212, §115, ch. 95-1/2; (3) that he failed and omitted to yield the right-of-way or slow down or stop his automobile in violation of par. 171, §74, ch. 95-1/2, Ill. Rev. Stats. 1939, and (4) that he failed to keep a proper and sufficient lookout and as a direct and proximate result of such negligence the automobile struck plaintiff injuring her.

MARIE DEBRANGO,

Appellee,

v.

M. RUBIN,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY,

31017 1880

MR. PRESIDING JUDGE CONDON DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries claimed to have been sustained by her through the negligence of defendant in driving his automobile. There was a jury trial, a verdict and judgment in plaintiff's favor for \$8500, and defendant appeals.

The record discloses that about 9 o'clock on the evening of March 14, 1932, plaintiff, who was then about 32 years old, had been shopping with two other women in the neighborhood of Spaulding avenue and Roosevelt road, Chicago, and as they walked north crossing Roosevelt road on the east crosswalk of the street intersection plaintiff was struck and injured by defendant's automobile which was then being driven east in Roosevelt road. She was thrown to the ground and when the automobile stopped was underneath it and it was necessary to lift it up to rescue her.

The complaint was in two counts. In the first it was alleged plaintiff was in the exercise of due care and caution for her own safety and that defendant negligently drove his automobile (1) at a speed greater than was reasonably proper in view of the traffic and the use of the right-of-way, contrary to par. 143, 142, ch. 92-1/2; (2) that defendant omitted and neglected to sound a horn contrary to par. 315, 316, ch. 92-1/2; (3) that he failed and omitted to yield the right-of-way or slow down or stop his automobile in violation of par. 174, 175, ch. 92-1/2, Ill. Rev. Stat., 1932, and (4) that he failed to keep a proper and sufficient lookout and as a direct and proximate result of such negligence the automobile struck plaintiff injuring her.



The second count omitted the allegations that plaintiff was in the exercise of due care and caution for her own safety and charged defendant with "wilfully, wantonly and maliciously" violating the same sections of the statute referred to in count 1. Defendant in his answer denied the charges made against him and averred plaintiff was guilty of wilful and wanton conduct which contributed to the cause of the accident. Plaintiff filed a reply denying she was guilty of the charge of wilful and wanton conduct made by defendant in his answer.

The evidence shows there were a number of business houses near the intersection of the two streets; that they were open, the lights lit and the street intersection well lighted. There were four occurrence witnesses, plaintiff, her sister, Annette Joerger, Clara Petrone, 26 years old, and defendant. As stated, plaintiff and the other two women had been shopping and had just left a store on the south side of Roosevelt road a short distance west of Spaulding avenue; they walked east across Spaulding avenue intending to go north on the east crosswalk across Roosevelt road which is a wide street at that point. The three women walked out into the roadway, saw defendant's automobile about a block west of Spaulding avenue coming east, and the evidence tends to show it was straddling the north rail of the eastbound street car track. There were two lines of street car tracks in Roosevelt road.

According to the testimony of the three women it appears that just before the automobile struck plaintiff it was traveling about 35 miles an hour and the auto struck plaintiff when she was on the east crosswalk of the street intersection, while the testimony of defendant was that he was traveling about 15 miles an hour and plaintiff was on the west crosswalk when she was struck.

As the three women left the sidewalk at the southeast corner of the intersection and proceeded north on the east crosswalk, according to their testimony, plaintiff was a step or two ahead of the other two women. She testified that about the time

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The evidence shows there were a number of business houses near the intersection of the two streets; that they were open, the lights lit and the street intersection all lighted. There were four occurrence witnesses, plaintiff, her sister, Annette Berger, Clara Petrone, 35 years old, and defendant. As stated, plaintiff and the other two women had been shopping and had just left a store on the south side of Roosevelt road a short distance west of Spaulding avenue; they walked east across Spaulding avenue intending to go north on the east crosswalk across Roosevelt road which is a wide street at that point. The three women walked out into the roadway, saw defendant's automobile about a block east of Spaulding avenue coming east, and the evidence tends to show it was approaching the north rail of the eastbound street car track. There were two lines of street car tracks in Roosevelt road.

According to the testimony of the three women it appears that just before the automobile struck plaintiff it was traveling about 35 miles an hour and the auto struck plaintiff when she was on the east crosswalk at the street intersection, while the testimony of defendant was that he was traveling about 15 miles an hour and plaintiff was on the west crosswalk when she was struck.

As the three women left the sidewalk at the intersection corner of the intersection and proceeded north on the east crosswalk, according to their testimony, plaintiff was a step or two ahead of the other two women. She testified that about the time

she started north to cross Roosevelt road, five or six persons started from the north side of Roosevelt road on the east crosswalk to cross the street walking south and they passed plaintiff and the other two women as the latter were proceeding north; that at that time defendant's automobile was about a block away to the west - 150 to 200 feet; "I saw the car all the time from the time it was several hundred feet away up until the automobile came to Spaulding;" that the headlights of the automobile were on, no horn was sounded. "The car changed its course to the south when it was about 15 to 20 feet away. \*\*\* There were no other automobiles in the intersection;" that she was struck by the automobile and lost consciousness.

On cross-examination she testified that when she saw defendant's automobile coming from the west it was straddling the north rail of the eastbound track, "He [defendant] swung in order to save me, and I thought he was going to swing more on the street car tracks which he didn't and he swung a little off to the south side of the street, and I got struck;" that at that time she had about reached the first or south rail of the eastbound track. "He turned his car to the south in order to save me. I wanted to save myself and I took a step forward instead of backward and either way I went I was struck." Plaintiff's testimony is corroborated by the testimony of the other two women who were with her.

Defendant testified the traffic was heavy at the time and place; that there were cars parked along the curb and pedestrians on the sidewalks; as he approached Spaulding avenue he was going east about 15 miles an hour following the traffic - 8 to 10 feet behind the car preceding him; that when he was 10 feet from the east end of the safety island he noticed a pedestrian standing in the crosswalk alongside the safety island; "As I got closer a woman stepped right in my path, and I immediately swung to the left into the westbound traffic lane, hit a car and bounced back and hit the plaintiff." (It is conceded in the argument that the

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car defendant claims to have struck at the time was a westbound automobile.) Defendant further testified he stopped a few feet east of the east curb. "These people were crossing on the west crosswalk. Mrs. Derango [plaintiff] was lying underneath my auto, and we raised my car, lifted Mrs. Derango into another car and took her away. \*\*\* No other person attempted to cross the street when I was approaching. The right front headlight of my auto was broken, and tipped back a little, and my left front fender apron was caved in."

Other witnesses were called, including police officers who examined defendant's automobile and found no evidence of any damage to the left side of the car; that there were some rusty places on that side but it showed no evidence of having recently collided with a westbound automobile. The right headlight of the car was broken and it appears without question that is the part which first came in contact with plaintiff.

The jury returned its verdict finding defendant guilty, assessed plaintiff's damages at \$8500 and at the same time the court submitted the following interrogatory to it: "Did the defendant, M. Rubin, at the time and place in question wilfully and wantonly operate the automobile in question?" The interrogatory was answered "Yes" and signed by all of the jurors.

Defendant contends "The manifest weight of the evidence shows that the plaintiff was guilty of contributory negligence" and "The manifest weight of the evidence shows that the plaintiff was guilty of wilful and wanton conduct proximately contributing to her injury." In support of this counsel says the evidence shows that just before the accident "plaintiff was standing still and waiting for him to pass. When about 10 feet from the pedestrians who were so waiting, a woman, the plaintiff, stepped directly in front of his oncoming car. He swung to the left toward the westbound lane of traffic, struck a car which was to his left, and hit the plaintiff who had continued to walk in a northerly direction on the crosswalk."

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Defendant contends "The manifest weight of the evidence shows that the plaintiff was guilty of contributory negligence" and "The manifest weight of the evidence shows that the plaintiff was guilty of willful and wanton conduct grossly contributing to her injury." In support of this counsel says the evidence shows that just before the accident "plaintiff was standing still and waiting for him to pass. When about 10 feet from the pedestrians who were so waiting, a woman, the plaintiff, stepped directly in front of his oncoming car. He swung to the left toward the westbound lane of traffic, struck a car which was to his left, and at the plaintiff who had continued to walk in a northerly direction on the crosswalk."

We think the question of whether plaintiff was guilty of contributory negligence or whether she was guilty of wanton misconduct which proximately contributed to her injuries was for the jury. It found in favor of plaintiff. Its finding was approved by the trial judge who saw and heard the witnesses. Upon a careful consideration of all the evidence we are unable to say the finding and judgment is against the manifest weight of the evidence. If defendant was driving at a speed of 35 miles per hour in view of the traffic and all the surrounding circumstances, as disclosed by the evidence, the jury might find his conduct was such as to indicate a wanton disregard for the rights of others in the street at the time. Walldren Express Co. v. Krug, 291 Ill. 472; Price v. Bailey, 265 Ill. App. 358; Nosko v. O'Donnell, 260 Ill. App. 544; Schoenbacher v. Kadetsky, 290 Ill. App. 28; Brown v. Ill. Terminal Co. 319 Ill. 326.

We are also of opinion the jury might find from the evidence that plaintiff was faced with an emergency and stepped forward instead of backward. In such circumstances defendant might properly be held liable. The Wesley City Coal Co. v. Healer, 84 Ill. 126; Barnes v. The Danville Street Ry. & Light Co., 235 Ill. 566; Skala v. Lehon, 258 Ill. App. 252. In the Skala case this court said: "As said in Wesley City Coal Co. v. Healer, 84 Ill. 126: 'It has long been settled, that a party having given another reasonable cause for alarm cannot complain that the person so alarmed has not exercised cool presence of mind, and thereby find protection from responsibility from damages resulting from the alarm.' We deem it unnecessary to consider whether he erred in judgment in view of the fact that he had to act in a sudden emergency, and his act is not to be viewed in the light of after events but judged under all the circumstances by the standard of what a prudent person would have been likely to do under the same circumstances. (Barnes v. Danville Street Ry. Co., 235 Ill. 566, 571.)"

From what we have said it follows the court did not err

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We are also of opinion the jury might find from the evidence that plaintiff was faced with an emergency and stepped forward instead of backward. In such circumstances defendant might properly be held liable. The Wesley City Coal Co. v. Heiler, 84 Ill. 128; Barnes v. The Danville Street Ry. Co., 205 Ill. 568; Skala v. Hanson, 238 Ill. App. 329. In the latter case this court said: "As said in Wesley City Coal Co. v. Heiler, 84 Ill. 128: 'It has long been settled, that a party having given another reasonable cause for alarm cannot complain that the person so alarmed has not exercised cool presence of mind, and thereby find protection from responsibility from damages resulting from the alarm.' We deem it unnecessary to consider whether an error in judgment in view of the fact that he had to act in a sudden emergency, and his not is not to be viewed in the light of after events but judged under all the circumstances by the standard of what a prudent person would have been likely to do under the same circumstances." (Barnes v. Danville Street Ry. Co., 205 Ill. 568, 571.)

From what we have said it follows the court did not find



in refusing to set aside the special finding of the jury as being against the manifest weight of the evidence.

A further complaint is made that the court should have sustained defendant's motion at the close of the evidence to strike from the complaint the allegations of the failure of defendant to sound a horn because the evidence showed plaintiff saw the automobile coming towards her from the time it was about 200 feet away and in these circumstances the law would not require the doing of a useless act - warn plaintiff when she saw he was coming. On the other side, counsel for plaintiff says plaintiff had a right to assume defendant would obey the law and while she saw the car coming some distance west of the intersection, if defendant had sounded his horn it might have indicated to her that he did not intend to slacken his speed or stop the automobile. The statute gave plaintiff and her two companions the right-of-way over automobiles, although it is common knowledge that in actual practice the law is often disregarded.

We think there was no error in denying defendant's motion to strike this allegation from the complaint nor in instructing the jury that it might find for plaintiff if it found defendant was guilty of any of the four charges made in each of the two counts, provided, it further found plaintiff was injured as a direct and proximate result of such dereliction on defendant's part.

It is further contended the court erred in permitting plaintiff's counsel to ask Dr. Callahan "whether a particular condition might or could be caused by trauma" or violence. We think there was no error in the ruling of the court. The doctor was examined and cross-examined in considerable detail and we think the testimony given was entirely proper. In this connection counsel for defendant says there was "no causal relation shown in this case between the alleged condition of the back, to-wit, the position of the fifth lumbar vertebrae and the accident." The evidence shows plaintiff was well and healthy before the accident. A number of X-ray pictures were taken. Doctors testified on both sides as

in refusing to set aside the special finding of the jury as being against the manifest weight of the evidence.

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mobile coming towards her from the time it was about 200 feet away and in these circumstances the law would not require the doing of a useless act - warn plaintiff when she saw he was coming. On

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shows plaintiff was well and healthy before the accident. A number

experts. We think it would serve no purpose to discuss the evidence nor the argument of counsel for we are of opinion the evidence admitted was proper and the question was for the jury to decide.

Chicago Union Traction Co. v. May, 221 Ill. 530; Rehthaler v. Crane Co. 218 Ill. App. 267.

It is also contended that remarks of plaintiff's counsel were improper and reversibly erroneous. When defendant was on the stand he testified he turned to the north "making every effort to avoid Mrs. Derango-." Plaintiff objected and the words, "every effort" were stricken. Continuing the witness said: "When I made every effort to avoid-" [striking plaintiff] on plaintiff's objection this was stricken and thereupon plaintiff's counsel said if he had made any effort the accident would not have happened. Counsel for defendant then moved to withdraw a juror and to declare a mistrial which was overruled. We think there was no prejudicial error,

Defendant further contends that during the trial plaintiff had been "putting on an act, twitching her body, grimacing as if in great pain and at times crying. The court himself admitted seeing some of this conduct on the part of plaintiff." That "There was more here than the usual tear shed by a plaintiff. There was a constant effort on the part of the plaintiff to play on the sympathies of the jury" and the court should have sustained defendant's motion to withdraw a juror and to declare a mistrial. We have examined the record in this respect. The jury was instructed that it was not to decide the case on the ground of sympathy. We think it was not affected nor misled and the court did not commit reversible error in overruling the motion.

It is further contended the verdict and judgment are excessive. The evidence shows plaintiff was severely injured; there was a fracture of the left knee as a result of which there is a 15 degree permanent loss of motion; that the fifth lumbar vertebrae was displaced about one-fourth of an inch. These conditions are permanent. Plaintiff was in good health prior to the accident,

experts. We think it would serve no purpose to discuss the evidence nor the argument of counsel for we are of opinion the evidence admitted was proper and the question was for the jury to decide.

Chicago Union Traction Co. v. May, 231 Ill. 530; Reithaler v. Crane Co. 218 Ill. App. 237.

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Defendant further contends that during the trial plaintiff had been "putting on an act, twisting her body, grimacing as if in great pain and at times crying. The court himself admitted seeing some of this conduct on the part of plaintiff." That "There was more here than the usual test shed by a plaintiff." There was a constant effort on the part of the plaintiff to play on the sympathies of the jury" and the court should have sustained defendant's motion to withdraw a juror and to declare a mistrial. We have examined the record in this respect. The jury was instructed that it was not to decide the case on the ground of sympathy. We think it was not affected nor misled and the court did not commit reversible error in overruling the motion.

It is further contended the verdict and judgment are excessive. The evidence shows plaintiff was severely injured; she was a fracture of the left knee as a result of which there is a degree permanent loss of motion; that the left lower vertebra was displaced about one-fourth of an inch. These conditions are

worked 8 hours a day for 10 years earning from \$21 to \$22 a week except when her children were born. She has been unable to work from the time of the accident, March 14, 1939, up to the time of the trial, May 15, 1940. She was struck by the automobile, thrown in the air and when the car stopped was underneath it and it had to be lifted so she could be removed. Without going into further detail, the evidence shows she was severely injured. She was taken to the hospital where she remained a number of weeks and a cast was placed on her left leg where it remained for about 9 or 10 weeks. She was confined to the hospital about 6 weeks. By the doctor's advice she was wearing a special corset or brace to give her support. The evidence shows she suffered a great deal of pain; she incurred considerable expense in doctor's and hospital bills and loss of money she would have otherwise earned.

Upon a careful consideration of all the evidence we are unable to say the amount of the verdict and judgment is so excessive as to warrant interference on our part.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, J. concurs.

Mr. Justice McSurely dissenting:

In my opinion there was no evidence supporting the malice count. Plaintiff was struck by the swerving of the car to the south. Defendant says this was caused by the rebound from the contact of his car with a westbound car on his north towards which he was swinging his car to avoid hitting plaintiff. Plaintiff says defendant swung his car in order to save her. This negatives malice. Greene v. Noonan, 372 Ill. 286.

worked 8 hours a day for 10 years earning from \$1 to \$2 a week except when her children were born. She was then unable to work from the time of the accident, March 14, 1940, up to the time of the trial, May 15, 1940. She was struck by the automobile, driven in the air and when the car stopped was underneath it and it had to be lifted so she could be removed. Without going into further detail, the evidence shows she was severely injured. She was taken to the hospital where she remained a number of weeks and a cast was placed on her left leg where it remained for about 6 or 10 weeks. She was confined to the hospital about 6 weeks. By the doctor's advice she was wearing a special corset or brace to give her support. The evidence shows she suffered a great deal of pain; she incurred considerable expense in doctor's and hospital bills and loss of money she would have otherwise earned. Upon a careful consideration of all the evidence we are unable to say the amount of the verdict and judgment is excessive as to warrant interference on our part. The judgment of the Superior Court of Cook County is affirmed.

THE COURT AFFIRMS.

Matchett, J. concurs.

Mr. Justice McHenry dissents.

In my opinion there was no evidence supporting the motion count. Plaintiff was struck by the rear of the car to the south. Defendant's car was owned by the defendant. The fact of his car with a speeding car on the road to which he was swinging his car to avoid hitting plaintiff. Plaintiff says defendant swung his car in order to save her. This is not a malice. Greene v. Hogan, 378 Ill. 386.

41237

310 I.A. 537<sup>1</sup>

JOHN P. FRIEDLUND,

APPEAL FROM

Appellant,

v.

SUPERIOR

HOWARD E. BISHOP, and EUGENE H. DUPEL,  
individually and as co-partners  
doing business under the name and style of  
LYMAN, ADAMS, BISHOP AND DUPEL,

COT

Appellees.

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF  
THE COURT.

Plaintiff brings this appeal from an order entered in the Superior Court sustaining a motion by defendants at the conclusion of plaintiff's case, for a finding for defendants. Plaintiff an attorney brought suit against defendants, also attorneys, for forwarding or associate fees arising out of the condemnation proceedings for the widening of LaSalle Street in Chicago. The cause was heard before the court without a jury and the court found for the defendants without requiring the latter to put in any evidence to sustain their answer.

No point is raised on the pleadings.

Plaintiff's theory of the case is that a written agreement between attorneys for division of fees, based upon responsibility assumed by the lawyers and the work done, is an enforceable contract.

Defendants' theory of the case, as accepted and expressed by the trial court, appears to be:

(1) An attorney who holds legal title to his client's property, even at the request of client, cannot act in the capacity of forwarding attorney;

(2) That payment of fee to attorney under such circumstances would, in effect, constitute payment to his client; that his client cannot practice law; therefore, agreement is unenforceable.

JOHN P. WHELAN

Appellant

HOWARD F. EINHORN, and EUGENE F. DUBOIS, individually and as co-defendants, and as co-defendants in going business under the name and style of LYMAN, ADAMS, EINHORN and DUBOIS.

Appellees

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE DECISION OF

THE COURT.

Plaintiff brings this appeal from an order entered in the Superior Court sustaining a motion by defendants at the conclusion of plaintiff's case, for a finding for defendants. Plaintiff an attorney brought suit against defendants, also attorneys, for forwarding or associate fees arising out of the condemnation proceedings for the widening of LaSalle Street in Chicago. The case was heard before the court without a jury and the court found for the defendants without requiring the facts to rest in any evidence to sustain their answer. No point is raised on the pleadings.

Plaintiff's theory of the case is that a written agreement between attorneys for division of fees, based upon responsibility assumed by the lawyers and the work done, is an ultra-vires contract. Defendants' theory of the case, as pleaded and expressed by the trial court, appears to be:

- (1) An attorney who holds legal title to his client's property, even at the request of client, cannot act in the capacity of forwarding attorney;
- (2) That payment of fee to attorney under such circumstances would, in effect, constitute payment to his client; that his client cannot practice law; therefore, agreement is unenforceable.



To sustain his position plaintiff offered in evidence letters and papers purporting to be contracts showing that plaintiff, who is a lawyer, represented a Masonic lodge which had purchased certain real estate herein involved. The defendants were experts in condemnation and special assessment matters and plaintiff and defendants entered into a formal contract by which the defendants were to do the legal work involved in a condemnation and special assessment concerning said real estate. The amount of defendants' charges were agreed upon, of which plaintiff was to receive one-third and the defendants two-thirds. The fees were on a contingent basis so far as the defendants were concerned and largely dependent upon their success in having the condemnation award increased or having the special assessment on the property decreased.

A cross-complaint was filed by one of the defendants, Dupee, against Bishop.

At the conclusion of plaintiff's evidence to support his claim, a motion was made by all of the defendants, including the cross-complainant, to find for the defendants. Nothing was said about the cross-complaint in said motion.

The plaintiff offered evidence tending to prove the contract or agreement between the plaintiff and the defendants; the performance of the work by the defendants as contemplated by said contract; the receipt by the defendants of the money agreed upon as fees amounting to \$10,023.83 of which plaintiff claims one third and also the nonpayment of plaintiff's share of the fees as agreed upon and as set forth in the contract. There is no doubt that plaintiff made out a prima facie case, but, notwithstanding such condition of the record, the court found for the defendants and dismissed the suit. Nothing was done regarding the cross complaint. Such action by the trial court should not have been taken and it amounted to reversible error.

To sustain his position plaintiff offered in evidence letters and papers purporting to be contracts showing that plaintiff, who is a lawyer, represented a Masonic lodge which had purchased certain real estate herein involved. The defendants were experts in condemnation and special assessment matters and plaintiff and defendants entered into a formal contract by which the defendants were to do the legal work involved in a condemnation and special assessment concerning said real estate. The amount of defendants' charges were agreed upon, of which plaintiff was to receive one-third and the defendants two-thirds. The fees were on a contingent basis so far as the defendants were concerned and largely independent upon their success in having the condemnation award increased or having the special assessment on the property decreased. A cross-complaint was filed by one of the defendants,

Dupre, against Bishop.

At the conclusion of plaintiff's evidence to support his claim, a motion was made by all of the defendants, including the cross-complainant, to find for the defendant. Bishop was said about the cross-complaint in said motion.

The plaintiff offered evidence tending to show the contract or agreement between the plaintiff and the defendants; the performance of the work by the defendants as contemplated by said contract; the receipt by the defendants of the money earned upon the fees amounting to \$10,000.00 of which plaintiff claims one-third and also the payment of plaintiff's share of the fees as agreed upon and set forth in the contract. There is no doubt that plaintiff made out a prima facie case, and, notwithstanding such evidence of the record, the court found for the defendant and dismissed the suit. Nothing was done regarding the cross-complaint. Such action by the trial court should not be reversed and is deemed to be reversible error.

Complaint is also made as to the ruling of the court on the admissibility of evidence, when plaintiff was presenting his case in chief, to which the court sustained objections and refused to admit the evidence. But, inasmuch as we think the error committed in finding for the defendants requires a reversal of the finding and a remanding of the cause, it is scarcely necessary to point out that the motion of a defendant to find in its favor at the conclusion of plaintiff's case, is equivalent to a demurrer to the evidence, and every presumption should be indulged in favor of the plaintiff's evidence and every favorable legal inference which may be drawn therefrom. The court is not permitted to weigh the evidence, but if there is any evidence favorable to the plaintiff and which sustains to any degree the claim of plaintiff, the court should overrule the motion of the defendant. In the instant case this was not done and, therefore, reversible error was committed. Shutsen v. Bloomenthal, 371 Ill. 244; John Deere Plow Co. v. Carner, 350 Ill. 104.

For the reasons herein given the order of the Superior Court is reversed and the cause is remanded for a new trial.

ORDER REVERSED AND CAUSE REMANDED.

HEBEL, .J. AND BURKE, J. CONCUR.

Complaint is also made as to the ruling of the court on the admissibility of evidence, when plaintiff was presenting his case in chief, to which the court sustained objections and refused to admit the evidence. But, inasmuch as we think the error committed in finding for the defendant requires a reversal of the finding and a remanding of the cause, it is expressly necessary to point out that the motion of a defendant to find in its favor at the conclusion of plaintiff's case, is equivalent to a demurrer to the evidence, and every presumption should be indulged in favor of the plaintiff's evidence and every favorable legal inference which may be drawn therefrom. The court is not permitted to weigh the evidence, but if there is any evidence favorable to the plaintiff and which sustains to any degree the claim of plaintiff, the court should overrule the motion of the defendant. In the instant case, this was not done and, therefore, reversible error was committed.

Shaw v. Woodruff, 271 Ill. 304; Johns v. Fox Co. v. Woodruff, 250 Ill. 104.

For the reasons herein given the order of the superior court is reversed and the cause is remanded for a new trial.

REVEREND JUDGE OF THE COURT.

REVEREND JUDGE OF THE COURT.

41672

CHICAGO TITLE & TRUST COMPANY,  
as Trustee,

Appellee,

v.

MARIE E. FAGER, et al.,  
Defendants.

On Appeal of M. H. KAMM,  
Appellant.

APPEAL FROM

CIRCUIT COURT,  
COOK COUNTY.

310 I.A. 537<sup>2</sup>

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by M. H. Kamm from the order of the Circuit court refusing to confirm an offer made by him in the sale of property in a foreclosure proceeding.

The decree was entered January 31, 1938, finding there was due for foreclosure expenses over \$3000, and due on account of principal and interest over \$52,000; Kamm's bid at the master's sale was \$1500, which would not pay half of the expenses and would leave nothing to pay on the debt due the bondholders. A month before the present sale an offer of \$2250 was rejected by the court as insufficient. Now Kamm asks for the reversal of the order of court finding that his \$1500 bid is insufficient.

Counsel for Kamm correctly says that the approval of a master's sale is within the court's discretion but mere inadequacy of price is not sufficient ground to justify a court in refusing to confirm a sale. His brief treats the question presented as if the order of court set aside a sale which had been made. This is not the case.

In Straus v. Anderson, 366 Ill. 426, the opinion points out the distinction between the power of a court of equity to set aside a sale and to refuse to confirm a sale. The opinion says that setting aside of an executed sale will not ordinarily be done merely because of inadequacy of price, in the absence of proof of fraud or some irregularity; that in such cases the buyer has an interest or right in the property; but the refusal of the court to approve a

CHICAGO TITLE & TRUST COMPANY,  
as Trustee,

Appellee,

v.

MARIE E. FAGER, et al.,  
Defendants.

On Appeal of M. H. KAMM,  
Appellant.

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

MR. JUSTICE MEASURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by M. H. Kamm from the order of the Circuit court refusing to confirm an offer made by him in the sale of property in a foreclosure proceeding. The decree was entered January 31, 1935, finding there was due for foreclosure expenses over \$3000, and due on account of principal and interest over \$52,000; Kamm's bid at the master's sale was \$1500, which would not pay half of the expenses and would leave nothing to pay on the debt due the bondholders. A month before the present sale an offer of \$2800 was rejected by the court as insufficient. Now Kamm asks for the reversal of the order of court finding that his \$1500 bid is insufficient.

Counsel for Kamm correctly says that the approval of master's sale is within the court's discretion but that inadequacy of price is not sufficient ground to justify a court in refusing to confirm a sale. His brief treats the question presented as if the order of court set aside a sale which had been made. This is not the case.

In Strane v. Anderson, 363 Ill. 425, the opinion points out the distinction between the power of a court of equity to set aside a sale and to refuse to confirm a sale. The opinion says that setting aside of an executed sale will not ordinarily be done merely because of inadequacy of price, in the absence of fraud or some irregularity; that in such cases the buyer has an interest or right in the property; but the refusal of the court to approve a

purported sale falls into a different classification; in such a case the bid is only an offer to buy, and unless the court confirms the report of sale there is no sale. The opinion says that in this character of sales "the chancellor has a broad power in their supervision made under his direction and may, acting in his judicial discretion, confirm, or disapprove any such sale. (Miller v. Miller, 332 Ill. 177; Hart v. Burch, 130 id. 426.) In the latter type of sales the court may refuse to confirm the sale merely because of the inadequate price for which the premises are struck off. These principles are recognized in Levy v. Broadway-Carmen Building Corp. (ante, p. 279), where numerous authorities bearing upon the subject are reviewed."

There was ample testimony that the bid of \$1500 did not fairly represent the value of the property. A witness testifying for the bidder admitted that the replacement cost of the building on the premises would be over \$50,000. The appraisal by the Chicago Title & Trust Co. of the ground value alone was \$5000. Kamm's counsel says the property is subject to a large amount of taxes and penalties, but we will take judicial notice that the state's attorney has adopted a policy whereby reductions in penalties may be obtained. Moreover, only a month before the present bid there was an offer of \$2250 which the court then held to be insufficient. It is scarcely reasonable to suppose that the property depreciated to \$1500 in one month. There was no abuse of discretion on the part of the chancellor in refusing to confirm the bid.

It is not necessary for the objectors to a bid to guarantee a higher bid on a resale of the property. It was so held in the Straus case, citing Bondurant v. Bondurant, 251 Ill. 324, 329. This is especially true where the objector is a trustee, acting in its representative capacity for all the absent bondholders. In such a case the trustee should not be compelled to assume the obligation of guaranteeing a better bid.

For the reasons indicated the order of the Circuit court is affirmed.

ORDER AFFIRMED.

O'Connor, P.J., and Matchett, J. concur.

purported sale falls into a different classification; in such a case the bid is only an offer to buy, and unless the court confirms the report of sale there is no sale. The opinion says that in this character of sales "the chancellor has a broad power in his supervision made under his direction and may, acting in his judicial discretion, confirm, or disapprove any such sale." (Miller v. Miller, 332 Ill. 177; Hart v. Hart, 133 Ill. 423.) In the latter type of sales the court may refuse to confirm the sale merely because of the inadequate price for which the premises are struck off. These principles are recognized in Levy v. Broadway-Carnegie Building Corp. (ante, p. 278), where numerous authorities bearing upon the subject are reviewed.

There was ample testimony that the bid of \$1500 did not fairly represent the value of the property. A witness testifying for the bidder admitted that the replacement cost of the building on the premises would be over \$50,000. The replacement of Chicago title & trust Co. of the ground value alone was \$5000. Kahn's counsel says the property is subject to a large amount of taxes and penalties, but he will take judicial notice that the state's attorney has advised a policy of non-interference in general may be obtained. Moreover, only a month before the present bid there was an offer of \$2500 which the court then held to be insufficient. It is scarcely reasonable to suppose that the property depreciated to \$1500 in one month. There was no issue of discretion on the part of the chancellor in refusing to confirm the bid. It is not necessary for the object of a bid to guarantee a higher bid as a condition of the sale. It was so held in the Hyman case, citing Hyman v. Hyman, 251 Ill. 624, 629. This is especially true where the object is a trustee, acting in its representative capacity for all the absent bondholders. In such a case the trustee should be considered to assume the obligation of presenting a better bid. For the reasons indicated the order of the circuit court is affirmed.



41628

HERMAN ROTHENBERG,

Appellant,

v.

RADTKE BROS., INC., a  
Corporation,

Appellee.

\_\_\_\_\_  
ARMOUR & COMPANY, a Delaware  
Corporation,

Garnishee.

APPEAL FROM

MUNICIPAL COURT  
OF CHICAGO.

310 I.A. 538

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action in garnishment based on a judgment in favor of Rothenberg against Radtke Bros., Inc., the garnishee answered it was not indebted and had no property, etc. The answer and replies to interrogatories, however, disclosed an indebtedness to Fred G. Radtke, personally, to the amount of \$1662.28, for two shipments of cheese. F. G. Radtke and the Wisconsin Cold Storage Company, which claimed the fund by assignment from F. G. Radtke, intervened. The court heard the evidence, found for the garnishee and against plaintiff and entered an order discharging the garnishee.

The judgment debtor was Radtke Bros., Inc., a Wisconsin corporation. Its business office is at 1324 North 5th street in Milwaukee. F. G. Radtke is president and a director of the corporation, but says he is not active. The corporation has been in business since 1924. A brother, A. J. Radtke, is in charge of the business. The sign in front of the office in Milwaukee is "Radtke Bros., Inc." There is no other sign there. The telephones are listed under the same name. Radtke Bros., Inc. is in the commission business. It has never, however, dealt in cheese. Fred G. Radtke uses the same place for an office and the same telephone. About January 15, 1940, he says he told his brother the poultry

and commission business was "no good"; the brother thought other-

so Fred G. told him he might run it "and I will get myself  
something else started. That can be your business, and I will get

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

HERMAN ROTHENBERG,  
Appellant,  
v.  
RADTKE BROS., INC., a  
Corporation,  
Appellee.  
ARMOUR & COMPANY, a Delaware  
Corporation,  
Garnishee.

MR. JUSTICE MATHESON DELIVERED THE OPINION OF THE COURT.

In an action in garnishment based on a judgment in favor of Rothenberg against Radtke Bros., Inc., the garnishee answered it was not indebted and had no property, etc. The answer and replies to interrogatories, however, disclosed an indebtedness to Fred G. Radtke, personally, to the amount of \$1882.28, for two shipments of cheese. F. G. Radtke and the Wisconsin Cold Storage Company, which claimed the fund by assignment from F. G. Radtke, intervened. The court heard the evidence, found for the garnishee and against plaintiff and entered an order discharging the garnishee and against debtor was Radtke Bros., Inc., a Wisconsin corporation. Its business office is at 1784 North 6th street in Milwaukee. F. G. Radtke is president and a director of the corporation, but says he is not active. The corporation has been in business since 1934. A brother, A. L. Radtke, is in charge of the business. The sign in front of the office in Milwaukee is "Radtke Bros., Inc." There is no other sign on the telephone exchange listed under the same name. Radtke Bros., Inc. is in the commission business. It has never, however, dealt in cheese. Fred G. Radtke uses the same place for an office and the same telephone. About January 15, 1940, he says he told his brother the poultry and commission business was "no good"; the brother thought otherwise, so Fred G. told him he might run it "and I will get myself something else started. That can be your business, and I will get

in business for myself and make a living." Fred G. Radtke did not get any new stationery printed for use in his personal business. He says he did not wish to incur the expense. He used old stationery, some as old as 1929.

He had two transactions with Armour & Company in cheese. On July 1, 1940, the garnishee wrote, addressing its letter to "Radtke Brothers, 1324 North Fifth Street, Milwaukee, Wisconsin." The letter said:

"Confirming our telephone conversation today:

We understand that you will ship today if possible, if not, tomorrow sure, the following quantities of cheese to be invoiced at the prices shown below: \*\*\*"

In course, Armour & Company received an invoice dated July 1, 1940. The invoice showed delivery to Armour & Company at Jacksonville, Florida, of 250 Wisconsin State Brand Sq. Prints, "5240-3/4 16-3/4," amounting to \$877.82. The invoice is No. 13089. The printing on the stationery was this:

"RADTKE BROS.  
General Commission

Marquette  
1392-3

1324 N. 5th St.

LIVE and DRESSED POULTRY, VEAL AND EGGS,  
Milwaukee, Wis."

Later, Armour & Company received an invoice for 200 boxes Wisconsin State Brand Daisies, 4827-1/2, 16-1/4, amount, \$784.46. Printed matter on the stationery was:

"RADTKE BROS.  
General Commission

Marquette  
1392-3

1324 N. 5th St.

LIVE and DRESSED POULTRY, VEAL and EGGS  
Milwaukee, Wis."

A letter to the garnishee, dated July 6, 1940, marked for the attention of Mr. Cooney, informed the garnishee that "one of our trucks with cheese had a smash up near Birmingham, Alabama. This will result in a delayed delivery of cheese to Augusta and

in business for myself and make a living." Fred G. Radtke did not get any new stationery printed for use in his personal business. He says he did not wish to incur the expense. He used old stationery, some as old as 1929.

He had two transactions with Armour & Company in cheese. On July 1, 1940, the garnishes wrote, addressing the letter to "Radtke Brothers, 1324 North Fifth Street, Milwaukee, Wisconsin." The letter said:

"Confirming our telephone conversation today:

We understand that you will ship today if possible, if not, tomorrow sure, the following quantities of cheese to be invoiced at the prices shown below: \*\*\*"

In course, Armour & Company received an invoice dated July 1, 1940. The invoice showed delivery to Armour & Company at Jacksonville, Florida, of 250 Wisconsin State Brand 3d. Prints, "3240-3/4 18-3/4," amounting to \$87.88. The invoice is No. 12089. The printing on the stationery was this:

"RADTKE BROS.  
General Commission

Marguerite  
1398-3  
1324 N. 5th St.

LIVE and DRESSED POULTRY, VEAL AND EGGS.  
Milwaukee, Wis."

Later, Armour & Company received an invoice for 200 boxes Wisconsin State Brand Bales, 4837-1/2, 18-1/4, amount, \$784.42. Printed matter on the stationery was:

"RADTKE BROS.  
General Commission

Marguerite  
1398-3  
1324 N. 5th St.

LIVE and DRESSED POULTRY, VEAL AND EGGS  
Milwaukee, Wis."

A letter to the garnishes, dated July 6, 1940, marked for the attention of Mr. Gooney, informed the garnishes that "one of our trucks with cheese had a smash up near Birmingham, Alabama. This will result in a delayed delivery of cheese to Augusta and

Columbus." The letter was signed "F. G. Radtke." This particular letter was on stationery of "Radtke Bros., Inc."

Fred G. Radtke testified he personally arranged the sale of the cheese to Armour & Company. He said his office in Milwaukee was connected with number 1321, and had the same entrance. He started the cheese business in February or early March, 1940.

As a condition precedent to the purchase of goods, Armour & Company required the seller to give a guaranty against the adulteration or misbranding of the goods within the meaning of the Federal Food, Drug and Cosmetic act, etc. February 20, 1940, F. G. Radtke sent to Armour & Company such a guaranty signed by himself personally. February 21, Armour & Company wrote a letter to "Fred G. Radtke, Radtke Bros. Inc., Milwaukee, Wisconsin," acknowledging receipt of this guaranty, stating that it noticed the same was signed personally, and this would be all right if the cheese was going to be invoiced by F. G. Radtke personally, "but if the cheese is going to be invoiced by Radtke Brothers, Inc., we will have to have a guaranty from them, also." The letter said, "Please advise." F. G. Radtke replied February 26, 1940, on stationery of Radtke Bros., Inc., saying:

"Please be advised that F. G. Radtke is operating the business as an individual, and the billing to your Florida branches will be made by F. G. Radtke personally.

Therefore it should not be necessary to furnish a guaranty by Radtke Bros. Inc."

The evidence shows trucks were used in delivering the cheese. There is in evidence four certificates of title issued by the State of Wisconsin to Fred G. Radtke showing personal ownership of these trucks. On delivery of the cheese delivery tickets were taken. These are in evidence and indicate the cheese delivered to the garnishee was receipted as received from F. G. Radtke personally. Mr. Cooney, assistant to the department manager in charge of cheese procurement for Armour & Company, testified, "It was our opinion we were dealing with Mr. Radtke personally." He also said

"Columbus." The letter was signed "F. G. Radtke." This particular

letter was on stationery of "Radtke Bros., Inc."

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of the cheese to Armour & Company. He said his office in Milwaukee

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ally. Mr. Gooney, assistant to the department manager in charge of

cheese procurement for Armour & Company, testified, "It was my

opinion we were dealing with Mr. Radtke personally." He also said

if he had been purchasing from Radtke Bros., Inc., a corporation, a guaranty would have been required from it, and that no such guaranty was taken.

Fred G. Radtke also testified that to do business with Armour he had to pay for the cheese and deliver it at branch offices or get credit. He did not have enough money to finance the cheese. The Wisconsin Cold Storage Company gave him letters of guaranty upon his giving them assignments of the account so it could get the checks from Armour & Company when the cheese was paid for. There was a different guaranty and assignment with each transaction. Mr. Vaughn, auditor of the Wisconsin Cold Storage Company, testified he had never dealt with the Radtke Bros. corporation and that all their dealings for cheese were with Fred G. Radtke as an individual. He admitted that some of the checks bearing the indorsement of the Wisconsin Cold Storage Company were payable to Radtke, Bros., Inc. Fred G. Radtke testified that the reason for these indorsements was that he personally felt it was immaterial so long as the Wisconsin Cold Storage Company got the money paid for the cheese. He did not send the checks back for correction.

The trial court was of the opinion this evidence showed the transactions were between Armour & Company and Fred G. Radtke personally. The question on review is whether that finding is manifestly against the weight of the evidence or whether there is any evidence to support it. The use made of the old stationery in personal business of F. G. Radtke is not to be commended. It tends to confuse and mislead, and if this were a case where credit had been given in reliance upon this stationery an estoppel might be plausibly argued. There is, however, no question of estoppel here. Plaintiff is diligently seeking to collect a debt. His rights are limited by the Garnishment statute. He is entitled to reach any money or credits due from Armour & Company to the debtor corporation. He is not entitled to reach debts due by Armour & Company to Fred G. Radtke personally. Plaintiff is entitled to reach any money for

if he had been purchasing from Radtke Bros., Inc., a corporation, a guaranty would have been required from it, and that no such guaranty was taken.

Fred G. Radtke also testified that to do business with Armour he had to pay for the cheese and deliver it at branch offices or get credit. He did not have enough money to finance the cheese.

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The trial court was of the opinion this evidence showed the transactions were between Armour & Company and Fred G. Radtke personally. The question on review is whether what finding is manifestly against the weight of the evidence or whether there is any evidence to support it. The use made of the old stationery in personal business of F. G. Radtke is not to be commended. It tends to confuse and mislead, and if this were a case where credit had been given in reliance upon this stationery an error might be plainly argued. There is, however, no question of materiality. Plaintiff is diligently seeking to collect a debt. His rights are limited by the Garnishment statute. He is entitled to reach any money or credits due from Armour & Company to the debtor corporation. He is not entitled to reach debts due by Armour & Company to Fred G. Radtke personally. Plaintiff is entitled to reach any money for



which the judgment debtor, Radtke Bros., Inc., could have maintained an action against the garnishee. Campagna v. Automatic Electric, 293 Ill. App. 437; Drysch v. Prudential Ins. Co., 287 Ill. App. 68; Pogline v. Central Mutual Ins. Co., 280 Ill. App. 5. Radtke Bros., Inc. could not have recovered anything against Armour & Company in such a suit, therefore, plaintiff cannot recover.

Plaintiff argues the judgment order is against public policy on the theory that a debtor living in Illinois should be preferred in the courts of Illinois as against a creditor living in another state. He cites Smith v. Lamson Bros., 184 Ill. 71. It was held in that case that a voluntary assignment made in a foreign state could not defeat a local creditor attaching in the courts of this state. There is no such question here.

The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McSurely, J. concur.

which the judgment debtor, Radtke Bros., Inc., could have main-

tained an action against the garnishee. Gammage v. Automatic

Electric, 203 Ill. App. 437; Dwyer v. Prudential Ins. Co., 207 Ill.

App. 68; Pogline v. Central Mutual Ins. Co., 280 Ill. App. 2.

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& Company in such a suit, therefore, plaintiff cannot recover.

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another state. He cites Smith v. Lamson Bros., 184 Ill. 71. It

was held in that case that a voluntary assignment made in a foreign

state could not defeat a local creditor attaching in the courts of

this state. There is no such question here.

The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McGarvey, J. concur.

PEOPLE OF THE STATE OF ILLINOIS, )  
 Defendant in Error,

v.

J. LIVERT KELLY,  
 Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

310 I.A. 538<sup>2</sup>

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant was tried on an information charging him with assault and battery. The information alleged the assault was made on Alvin Lamb October 31, 1939, in Chicago, and was verified by Lamb. Defendant was arraigned, entered a plea of not guilty and was tried by a jury which returned a verdict of guilty. Motions for a new trial and in arrest were overruled and judgment entered on the verdict, and defendant sentenced to pay a fine of \$100.

It is contended the defense of alibi interposed was well established; that the conduct of the State's Attorney was improper and prejudicial; that the court erred in permitting the state to introduce evidence after the case was closed and in refusing to grant a continuance or declare a mistrial; that there is upon the whole record reasonable doubt of defendant's guilt, and that the verdict is clearly against the manifest weight of the evidence.

Defendant lives at 5322 Michigan avenue in Chicago. He helped organize and was business manager of the Retail Clerks' Union Local and had been connected with it for about eight years. The offices of the union were at 47th street and South Parkway in a building situated on the northwest corner of the intersection and on the second floor of the building. Elizabeth Russell was secretary of the union. Dr. L. C. Reed, a dentist, had an office on the same floor about 25 feet from the office of the union and around the north end of the hall, which was about 10 feet wide. A stairway from South Parkway led up to the second floor where the union office was located. Between the office and the stairway was a beauty parlor conducted by Miss Freddie Polk. Jack Sewell was

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

J. LIVERETT KELLY,  
Plaintiff in Error.

v.

MUNICIPAL COURT  
OF CHICAGO,  
Defendant in Error.

ERROR TO

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Defendant lives at 3333 Michigan Avenue in Chicago. He helped organize and was business manager of the Retail Clerks Union Local and had been connected with it for about eight years. The offices of the union were at 47th Street and South Parkway in a building situated on the northwest corner of the intersection and on the second floor of the building. Defendant himself was secretary of the union. Dr. J. J. Lee, a dentist, had an office on the same floor about 25 feet from the office of the union and around the north end of the hall, which was about 10 feet wide. Stairway from South Parkway led up to the second floor where the union office was located. Between the office and the stairway a beauty parlor conducted by Miss Freddie Bell, local laundress

an employee of the union, collected dues, etc., and did some janitor work. Jerry Taylor was business agent.

The complaining witness, Alvin Lamb, was a member of the union. Dues were \$2 monthly, which he says were paid by him. He had been employed by the A. & P. Tea Company but at the time was out of work. The management of the union had arranged to hold a dance for its benefit. Tickets were to be sold at 40 cents each. Jerry Taylor handed five of these tickets to Lamb, apparently with the expectation Lamb should pay for them. On the evening of October 30, Lamb gave these tickets to his friend, Harry Clark. Clark says he took the tickets to the office of the union and offered them to Kelly, telling Kelly the tickets had been given to him by Lamb who had told him to return them to Taylor. Clark says Kelly asked who Lamb was and the witness told him he was one of the clerks. Kelly then called Jerry Taylor, and Clark thereupon handed the tickets to Jerry. Defendant told Jerry to give them back to Clark and, as Clark says, told him that he was fighting the battles of someone else "and to get the hell out." Clark afterward returned the tickets to Lamb.

Lamb says that on the next day (October 31, 1939) at about 1:10 p.m., he left the A. & P. store at 66 E. 55th street and went to the union office; that he went by auto; started up Wabash avenue, where he met Clark, and they rode together to the office. While Clark waited outside Lamb went into the office and met the office girl, who asked his name and he told her. He says she asked him to have a seat; that he said, "No, I will stand." Kelly came out from his private office, asked his name, and Lamb told him. Whereupon he said, "Oh, yes, you're the \_\_\_\_\_ that caused me this trouble today." Lamb says defendant turned around, started into his office; that he (Lamb) asked him for time to pay for the tickets and that defendant said that was all, when two fellows jumped up, one of whom put a gun to his back and Kelly punched him in the eye with his fist several times. Lamb says defendant then ordered him

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Lamb says that on the next day (October 31, 1933) at about 1:10 p.m., he left the A. & P. store at 63 E. 55th street and went to the union office; that he went by auto; started up Abraham Avenue, where he met Clark, and they rode together to the office. While Clark waited outside Lamb went into the office and met the office girl, who asked his name and he told her. He says she asked him to have a seat; that he said, "No, I will stand." Kelly came out from his private office, asked his name, and Lamb told him. Whereupon he said, "Oh, yes, you're the \_\_\_\_\_ that caused me this

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from the office, and he left going downstairs where Clark was waiting for him in the hall. He called the South Park police and went with them back to the office where he met defendant coming out of the door. He asked the police to arrest defendant but defendant protested saying he was a law-abiding citizen. The police did not arrest him but advised Lamb to file the information, which he did.

Clark, who waited outside in what he calls the "vestibule" says he saw Lamb thrust out of the door of the union office; that he did not see Kelly strike him but that when the policemen came he heard Kelly say to Lamb, "If you don't let me alone you will end up in the hospital or morgue."

Dr. Schmoll, who rendered medical service to Lamb, testified that he found his face swollen and the right eye completely closed; that in lifting up the lid he discovered hemorrhage.

There is no doubt Lamb was cruelly beaten at the union office at the time in question. Defendant denies he had anything to do with the assault. He says he was at that very time in the office of Dr. Reed receiving treatment for his teeth. The janitor made a remark that "they were fighting." He raised up in the dental chair, heard the voice of one of his girls, went to the door, saw Lamb standing a few feet north of the stairway. There was a crowd in the hall fighting, and he separated them. He went to where Miss Russell was standing and asked her the cause of the disturbance. She said, "This man and Mr. Lamb was fighting." Defendant says he told the South Park police when they came in response to plaintiff's call that the man who hit Lamb went into the Golden State insurance office, which was just across the hall. Defendant says Lamb told the police when they came not that he was hit by defendant but that defendant knew who hit him. Lamb denies this and is corroborated by the police.

Miss Russell testified that Lamb came into the office at the time in question when only she and Miss Blanton, secretary of the bartenders' union, were present; that defendant had just gone

from the office, and he left going downstairs where Clark was waiting for him in the hall. He called the South Park police and went with them back to the office where he met defendant coming out of the door. He asked the police to arrest defendant but defendant protested saying he was a law-abiding citizen. The police did not arrest him but advised Lamb to file the information, which he did. Clark, who waited outside in what he calls the "vestibule" says he saw Lamb thrust out of the door of the union office; that he did not see Kelly strike him but that when the policemen came he heard Kelly say to Lamb, "If you don't let me alone you will end up in the hospital or morgue."

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out; that she told Lamb, who inquired, where defendant was; that Lamb said he would go and get him, that he wanted to give the tickets back and she said, "What is Mr. Kelly supposed to do with the tickets?"; whereupon Lamb made a filthy reply and a man (name unknown) who was talking with Miss Blanton "about insurance across the hall" told Lamb he should be ashamed to use such language in the presence of ladies; that Lamb asked him what he had to do with it; that the man took hold of Lamb's arm and for a few minutes they fought each other. Miss Russell says when they stopped fighting this man walked into the insurance office and Lamb down the stairway. This mysterious defender thus disappeared, his name, his business and his whereabouts henceforth unknown.

This is the substance of the defense interposed which, although in some details corroborated by Miss Blanton, the dentist, Miss Polk of the beauty parlor, and others connected with the office of defendant, was not believed by the jury or the trial judge. We also find it quite impossible to convince ourselves of its truth after a careful examination of the evidence. Indeed, we entertain no doubt of defendant's guilt.

Whether guilty or not, defendant was entitled to a fair trial. Defendant argues this was rendered impossible by the conduct of the State's attorney. He complains that the attorney for the state sought to raise unfair inferences from the fact that defendant's attorney waived his right to make an opening statement to the jury. He complains that in the State's Attorney's address to the jury he brought in the name of "Al Capone," applied to defendant the epithet of "dictator," intimated he had brought pressure to bear on the witnesses to secure testimony favorable to his theory. In an instance it is said the state went so far as to use the phrase "Again the crack of the dictator's whip," and in another instance applied to a witness the name of "lily white." A number of police officers testified that the reputation of defendant for truth and veracity was bad. It is urged defendant

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argued unfair inferences from this on the theory the police would have unusual opportunity to know defendant's reputation. The State's Attorney points out that while in eleven instances defendant now makes complaint on this ground, in only one on the trial was any adequate attempt made to preserve by proper objection the question for review. This is borne out by the record. If questions like this were to be raised on review the proper ground should have been laid by objections. People v. Allen, 368 Ill. 368.

It is urged the court erred in allowing a motion of the state to open up the case and receive testimony after the argument to the jury was begun. Defendant's attorney criticized the failure of the state to produce as witnesses the two policemen who responded to Lamb's call after he was assaulted. Defendant's attorney said the reason was that Lamb "didn't know the man who struck him, and Kelly wasn't the man." Out of the presence of the jury the state then made a motion to reopen the case and permit these officers to testify. The motion was allowed over defendant's objection, and defendant's motion to withdraw a juror and declare a mistrial was denied. Defendant then asked for a continuance of the case that he might meet whatever evidence was introduced. The court replied the motion would be proper after the evidence was heard. Thereupon the two witnesses testified and were cross-examined by attorneys for defendant. The motion for continuance was not renewed, and the case was fully argued to the jury.

A matter of this kind is within the discretion of the trial judge. He has the power which must be exercised with discretion and caution to promote the ends of justice. Welch, et al. v. People, 17 Ill. 338, 342; Brown v. Berry, 47 Ill. 175; People v. Lukosius, 242 Ill. 101; Rosehill Cem. Co. v. City of Chicago, 352 Ill. 11, 35.

We hold under all the circumstances the court did not abuse its discretion in this regard. We have no doubt defendant is guilty. He was ably defended by competent counsel. Friendly witnesses went far for him. The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McSurely, J. concur.

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We hold under all the circumstances the court did not abuse its discretion in this regard. We have no doubt defendant is fully defended by competent counsel. The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McGurely, J. concur.

41655

MRS. VELMA MAECHTLE,

Appellee,

APPEAL FROM

v.

MUNICIPAL COURT

CHECKER TAXI COMPANY,  
a Corporation,

OF CHICAGO.

Appellant.

310 I.A. 539

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the taxi company from a judgment for \$250 for plaintiff in an action for property damage and personal injuries sustained as the result of a collision between plaintiff's Packard Six automobile and a cab of defendant on December 22, 1938.

The statement of claim alleged that defendant drove negligently, carelessly and recklessly "or wilfully, wantonly and maliciously" to her damage. Defendant denied that it drove negligently and carelessly or wilfully and wantonly and maliciously, and filed a counterclaim in which it averred that the taxi cab was injured by the careless, negligent and reckless driving of plaintiff to its damage, etc.

At the close of all the evidence there was a motion by defendant for an instruction in its favor which was denied. The cause was submitted to the jury and there was a verdict for plaintiff against defendant in the sum of \$250, on which the court, overruling motions for a new trial, for judgment non obstante veredicto and in arrest, entered judgment and defendant appeals.

Defendant argues the instruction requested by it at the close of all the evidence should have been given; that it was error to submit a charge of wilful, wanton and malicious conduct to the jury since there was no evidence upon which to base it, and that there is no proof in the record that plaintiff's driver was in the exercise of due care at the time of the accident.

The evidence shows that December 22, 1938, plaintiff's Packard Six while being driven south on the west side of Sheridan road struck the cab of defendant, then making a left turn into

MRS. VELMA MARCHETTE,  
Appellee,  
v.  
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a Corporation,  
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MUNICIPAL COURT  
OF CHICAGO.

APPEAL FROM

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At the close of all the evidence there was a motion by defendant for an instruction in its favor which was denied. The cause was submitted to the jury and there was a verdict for plaintiff against defendant in the sum of \$250, on which the court, overruling motions for a new trial, for judgment non obstante veredicto and in arrest, entered judgment and defendant appeals.

Defendant argues the instruction requested by it as the close of all the evidence should have been given; that it was error to submit a charge of wilful, wanton and malicious conduct to the jury since there was no evidence upon which to base it, and that there is no proof in the record that plaintiff's driver was in the exercise of due care at the time of the accident.

The evidence shows that December 22, 1928, plaintiff's Packard six while being driven south on the west side of Sherman road struck the cab of defendant, then making a left turn into

Ardmore avenue, an east and west street which bisects Sheridan road. The only occurrence witnesses were plaintiff, her son Everett, who was driving, and Mr. Trob, the driver of the Checker cab.

Everett, the son of plaintiff, was twenty-three years of age and lived with his mother at 1509 Oak avenue in Evanston. On this particular evening, accompanied by his mother, he left his home in Evanston, driving the Packard Six and intending to visit a young married friend who lived "around" 65th street on the south side. He says they left about a quarter to seven p.m. The driver sat in the front seat; plaintiff, his mother, at his side on the right. The witnesses all agree it was dark and snowing and the streets were slippery. The street lights were burning. Plaintiff's car was driven close to the west curb of Sheridan road which is about 48 feet wide. They approached the point where Ardmore bisects Sheridan road about 7:30 p.m. Everett says he was driving between 15 and 20 miles an hour; the plaintiff says he was driving 10 to 20 miles an hour and that he was a good driver. Plaintiff says they went so slow that cars were passing them. Trob testified plaintiff's car was going about 35 miles per hour. When plaintiff's Packard was about 200 feet from the corner the driver says he saw the Checker cab then facing north in the middle lane of traffic, east of the center of the street. There were two southbound lanes of traffic. The witnesses all say traffic going north was heavy while that going south was light. As plaintiff's car was driven south the cab started to make a left-hand turn at the intersection. Plaintiff's auto was then 100 feet away. Everett says when he saw this turn was about to be made he took his foot off the accelerator and slowed down. The cab driver was accelerating, trying to get the cab out of his way, and in doing so the rear end of the cab skidded into the front end of the Packard. The right rear fender of the cab and the left front fender of the Packard came together.

Plaintiff apparently relied entirely on her driver. She says she saw the cab loom in front of them; "That was all. We hit

Armore Avenue, an east and west street which intersects Sheridan Road. The only occurrence witnesses were plaintiff, her son Everett, who was driving, and Mr. Trob, the driver of the Checker cab. Everett, the son of plaintiff, was twenty-three years of age and lived with his mother at 1508 Oak Avenue in Evanston. On this particular evening, accompanied by his mother, he left his home in Evanston, driving the Packard six and intending to visit a young married friend who lived "around" Oak street on the south side. He says they left about a quarter to seven p.m. The driver sat in the front seat; plaintiff, his mother, at his side on the right. The witnesses all agree it was dark and snowing and the streets were slippery. The street lights were burning. Plaintiff's car was driven close to the west curb of Sheridan Road which is about 48 feet wide. They approached the point where Armore Avenue intersects Sheridan Road about 7:30 p.m. Everett says he was driving between 15 and 20 miles an hour; the plaintiff says he was driving 10 to 20 miles an hour and that he was a good driver. Plaintiff says they went so slow that cars were passing them. Trob testified plaintiff's car was going about 35 miles per hour. When plaintiff's Packard was about 200 feet from the corner the driver says he saw the Checker cab then facing north in the middle lane of traffic, east of the center of the street. There were two southbound lanes of traffic. The witnesses all say traffic going north was heavy while that going south was light. As plaintiff's car was driven south and about started to make a left-hand turn at the intersection. Plaintiff's auto was then 100 feet away. Everett says when he saw this that was about to be made he took his foot off the accelerator and placed down. The cab driver was accelerating, trying to get the cab out of his way, and in doing so the rear end of the cab divided into the front end of the Packard. The right rear corner of the cab and the left front corner of the Packard came together. Plaintiff apparently relied entirely on her driver. She says she saw the cab loom in front of them; "that was all."



it."

Trob testified he had been driving a cab for about seventeen years and was a licensed chauffeur; that he was driving north on Sheridan road at the time in question, with the intention of making a left turn on Ardmore. He was in the left lane of the northbound traffic approaching Ardmore and made a full stop. Traffic was heavy, and he waited until it passed. His cab was at the center line of Ardmore avenue projected across Sheridan road. He was as close as possible to the left of the southbound line and waiting for a chance to make a left turn. His lights were on. He started to make the turn, although he had seen plaintiff's car coming 300 or 400 feet north of him. It was slippery so he started up slowly. He kept on looking at the automobile right along. He saw it was coming fast. He stepped on the gas in order to get away. When the rear of his cab was about 10 or 12 inches to the east of the west curb line, plaintiff, although there was a vacant southbound lane alongside of him, came on and struck the right rear fender of his cab. He had almost completed the left turn when he was struck. The driver of the Packard stepped on the brakes and the car slid towards the curb or towards the cab and hit him at the same time.

Defendant contends plaintiff has not proved exercise of due care. In Illinois it is necessary to allege and prove this as a matter of substantive law. Cases so holding are almost innumerable. We cite a recent authority. Francis v. Humphrey, 25 Fed. Supp. 1. Plaintiff practically admits that she personally did not exercise care. She did not see the Checker cab until the Packard was practically on it. She relied on her son, who was (she says) "a good driver." The cab driver says plaintiff's car was being driven over the slippery road and in the snow at 35 miles per hour. This was denied by plaintiff and her son, and the verdict of the jury sustains their theory on this point. The uncontradicted evidence, however, is also to the effect that there was no traffic

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Defendant contends Plaintiff has not proved expertise of due care. In Illinois it is necessary to allege and prove this as a matter of expert testimony. Cases are holding the almost innominate. We cite a recent authority, People v. Murphy, 25 Fed. Supp. 1. Plaintiff practically admits that she occasionally did not exercise care. She did not see the Chrysler cab until the Packard was practically on it. She relied on her own, and was (the eyes) "a good driver." The cab driver said Plaintiff's car was being driven over the slippery road and in the snow it slid over down. This was denied by Plaintiff and her son, and the verdict of the jury sustains their theory on this point. The court admitted evidence, however, is also to the effect that there was no traffic

in the second southbound lane just to the left of plaintiff. If her driver had moved into that lane there would have been no collision. We hold upon the whole evidence the verdict of the jury as to this point is manifestly against the weight of the evidence.

Plaintiff says defendant has waived this alleged error and cites our Rule 7 with Trust Company of Chicago v. Iroquois Auto Ins., 285 Ill. App. 317; Middleton v. Commercial Investment Corp., 301 Ill. App. 242; and McGoorty v. Benhart, 305 Ill. App. 458, 464. It is true that while the point is made defendant does not specifically argue that the verdict is against the manifest weight of the evidence. He argues the larger question of whether it is not wrong, as a matter of law. We hold the less is included in the larger. We hold the verdict as to contributory negligence is manifestly against the weight of the evidence.

Defendant makes the further point that the judgment should be reversed because there was no evidence from which the jury could reasonably find defendant was guilty of wilful and wanton conduct. We agree there was no such evidence. Plaintiff might well have withdrawn that charge before the cause was submitted. It may be, however, that by instructions submitted the cause as to that issue was waived. If it was not, then the submission of the cause on that issue under the circumstances would constitute reversible error. Greene v. Noonan, 372 Ill. 286, 23 N. E. (2d) 720; Schoenbacher v. Kadetsky, 290 Ill. App. 28; Trucking Co. v. Fairchild, 128 Ohio St. 519. However, every presumption is in favor of the judgment entered by the trial court. The instructions given are not in the record. We must presume they were such as were in conformity with the law. Therefore, we cannot reverse for this reason. However, for the reason that the verdict and judgment are manifestly against the evidence on the material issue of due care on the part of Everett, the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor, P.J., and McSurely, J. concur.

in the second southbound lane just to the left of Plaintiff. If her driver had moved into that lane there would have been no collision. We hold upon the whole evidence the verdict of the jury as to this point is manifestly against the weight of the evidence.

Plaintiff says defendant has waived this alleged error and cites our Rule 7 with Trust Company of Chicago v. Ingham & Co., 288 Ill. App. 317; Middleton v. Commercial Investment Corp., 301 Ill. App. 348; and McGoorty v. Bennett, 305 Ill. App. 488, 484. It is true that while the point is made defendant does not specifically argue that the verdict is against the manifest weight of the evidence. He argues the larger question of whether it is not wrong as a matter of law. We hold the law is included in the larger. We hold the verdict as to contributory negligence is manifestly against the weight of the evidence.

Defendant makes the further point that the judgment should be reversed because there was no evidence from which the jury could reasonably find defendant was guilty of willful and wanton conduct. We agree there was no such evidence. Plaintiff might have withdrawn that charge before the cause was submitted. It may be, however, that by instructions submitted the cause as to that issue was waived. If it was not, then the admission of the cause on that issue under the circumstances would constitute reversible error. Greene v. Noonan, 372 Ill. 288, 83 W. 2d 94; Schoenbacher v. Kadetaky, 290 Ill. App. 28; Trucking Co. v. Trenchard, 122 Ohio 519. However, every presumption is in favor of the judgment entered by the trial court. The instructions given are not in the record. We must presume they were given in conformity with the law. Therefore, we cannot reverse for this reason. However, for the reason that the verdict and judgment are manifestly against the evidence on the material issue of due care on the part of defendant, the judgment will be reversed and the cause remanded for another trial.

REVEREND AND HONORABLE,

O'Connor, P.J., and McGuire, J. concur.

41655

MRS. VELMA MAECHTLE,

Appellee,

v.

CHECKER TAXI CAB COMPANY,  
a Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

310 I.A. 539<sup>2</sup>

Abstract

SUPPLEMENTAL OPINION ON PETITION FOR REHEARING.

Plaintiff says in holding under Rule 7 of this court defendant had not waived its point that the verdict was manifestly against the evidence, constitutional guaranties of due process (both state and federal) were violated. Plaintiff is mistaken. The language of the rule is: "A point made but not argued may be considered waived." The subjunctive word "may" was used advisedly instead of the imperative "shall." In view of plaintiff's earnestness we have re-examined the briefs. We find defendant stated the point as No. 5 of its theory of the case and argued it with related points under division III of its brief. Plaintiff answered under division III of her brief (p. 21). Defendant replied under division III of its reply brief (pp. 5-6). In view of the language of the rule and the facts as above stated, the claim of denial of due process requires a lively imagination.

Rehearing denied.

REHEARING DENIED.

**RECEIVED**

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO

MRS. VELMA MARCHETTE,  
Appellee,  
v.  
CHECKER TAXI CAB COMPANY,  
a Corporation,  
Appellant.

**SUPPLEMENTAL OPINION ON PETITION FOR REHEARING.**

Plaintiff says in holding under Rule 7 of this court defendant had not waived the point that the verdict was manifestly against the evidence, constitutional guarantees of due process (both state and federal) were violated. Plaintiff is mistaken. The language of the rule is: "A point made but not argued may be considered waived." The disjunctive word "may" was used advisedly instead of the imperative "shall." In view of plaintiff's earnestness we have re-examined the briefs. We find defendant stated the point as No. 2 of the theory of the case and argued it with related points under division III of the brief. Plaintiff answered under division III of her brief (p. 31). Defendant replied under division III of its reply brief (pp. 3-6). In view of the language of the rule and the facts as above stated, the claim of denial of due process requires a lively imagination.

Rehearing denied.

FOR LAMING DURING

41669

DELLA J. LYNDON and MARY E. ANDERSON,  
Appellees,

APPEAL FROM

SUPERIOR COURT,

THE TRUST COMPANY OF CHICAGO, a  
Corporation,

COOK COUNTY.

Appellant.

310 I.A. 540

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

*per lit. 6-20-41*  
*defendant is the same*  
The parties here are identical and the facts similar to those in Anderson v. Trust Company of Chicago, 305 Ill. App. 623.

In brief, plaintiffs made a contract with H. O. Stone & Company by which Stone & Company agreed to sell, plaintiffs to buy, real estate described in the contract. The contract provided when payments were completed plaintiffs were to receive the deed, etc. The contract also provided that it should be binding on the heirs, successors, assigns, etc. of the respective parties.

Stone & Company assigned the contract and conveyed the land to the Chicago Trust Company which afterwards merged with the Central Bank & Trust Company, which in turn assigned the contract and conveyed the land to defendant. Defendant employed Chicago Realty Finance Company as its agent, and like its predecessors in title procured a decree of court authorizing it to carry out the trust created by H. O. Stone & Company for the benefit of the holders of this and like contracts. The Finance Company collected payments due under the contract with plaintiffs and represented to plaintiffs that when payments were completed defendant would deliver a deed to the premises. July 15, 1938, there was a balance due of \$132.32, which plaintiffs tendered. Defendant refused to make a deed, having already conveyed the land to a third party. This suit followed to recover payments made by plaintiffs under the terms of their contract.

The answer of defendant admits the misrepresentations made by the Finance Company and the conveyance by defendant to a third party, and admits its liability to return the money actually paid by

DELLA J. LYNDON and MARY E. ANDERSON,  
Appellees,

SUPREME COURT,

COOK COUNTY,

THE TRUST COMPANY OF CHICAGO, a  
Corporation,

Appellant.

MR. JUSTICE MATHESON DELIVERED THE OPINION OF THE COURT.

The parties here are identical and the facts similar to those in Anderson v. Trust Company of Chicago, 308 Ill. App. 833. In brief, plaintiff made a contract with H. O. Stone & Company by which Stone & Company agreed to sell, plaintiff to buy, real estate described in the contract. The contract provided when payments were completed plaintiff was to receive the deed, etc. The contract also provided that it should be binding on the heirs, successors, assigns, etc. of the respective parties. Stone & Company assigned the contract and conveyed the land to the Chicago Trust Company which afterwards merged with the Central Bank & Trust Company, which in turn assigned the contract and conveyed the land to defendant. Defendant employed Chicago Realty Finance Company as its agent, and like its predecessors in title procured a decree of court authorizing it to carry out the trust created by H. O. Stone & Company for the benefit of the holders of this and like contracts. The Finance Company collected payments due under the contract with plaintiff and represented to plaintiff that when payments were completed defendant would deliver a deed to the premises. July 15, 1928, there was a balance due of \$132.32, which plaintiff tendered. Defendant refused to make a deed, having already conveyed the land to a third party. This suit followed to recover payments made by plaintiff under the terms of their contract.

The answer of defendant admitted the facts and stated that by the Finance Company and the conveyance by defendant to a third party, and admits its liability to return the money actually paid.



plaintiffs to it. It contends, however, it is not obligated to repay money paid by plaintiffs to H. O. Stone & Company and their prior successive assignees. It urges the proposition of law that there is a lack of privity of contract between the purchaser of land and a third party to whom the contract has been transferred by the vendor. Corbus v. Teed, 69 Ill. 205; Hammer v. Johnson, 44 Ill. 192; Threlkeld v. Norris, 300 Ill. 223. This proposition of law, generally true, is not applicable here because it appears from the entire evidence that there was an intention on the part of the successive assignees and grantees and their assignors and grantors, respectively, to assume the obligations of the original vendor under the contract.

Defendant says the complaint did not state a cause of action. Defendant made a motion to strike the complaint under §45 of the Civil Practice act (Smith-Hurd Anno. Stats., ch. 110, par. 169, p. 287) which provides motions shall be substituted for demurrers. The motion was denied. Defendant answered, thus waiving the motion. Eddy v. Eddy, 302 Ill. 446, 450; Cottrell v. Gerson, 371 Ill. 174, 179. On oral argument our attention was called to Rule 21 of the Supreme court which is, however, applicable only to a motion made under §48 of the Civil Practice act (Smith-Hurd Anno. Stats. ch. 110, par. 172; and par. 259.21 p. 547) which provides for voluntary dismissal for certain defects. Moreover, after judgment the pleadings are to be liberally construed to sustain the judgment. Hinchliff v. Rudnick, 212 Ill. 569, 575; Miller v. Kresge Co., 306 Ill. 104, 107; Roumbas v. City of Chicago, 332 Ill. 70. We hold the complaint was sufficient under §42 of the Civil Practice act (Smith-Hurd Anno. Stats., ch. 110, par. 166 [1], [2] and [3].) The complaint alleged that defendant in accepting the deed "thereby assumed and agreed to perform plaintiffs' contract." Defendant says the deed was only quitclaim and there is no proof it contained any clause by which defendant agreed to assume the obligations of the contract. The execution and delivery of the deed was only a part of the whole transaction. Defendant took title to

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pay money paid by plaintiffs to H. O. Stone & Company and their  
prior successive assignees. It urges the proposition of law that  
there is a lack of privity of contract between the purchaser of  
land and a third party to whom the contract has been transferred  
by the vendor. Gordon v. Teed, 89 Ill. 203; Hammer v. Johnson, 44  
Ill. 132; Threlkeld v. Norris, 300 Ill. 223. This proposition of  
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169, p. 237) which provides motions shall be substantiated for demur-  
rers. The motion was denied. Defendant answered, thus averring the  
motion. Eddy v. Eddy, 302 Ill. 446, 450; Gottlieb v. Gerson, 271  
Ill. 174, 179. On oral argument our attention was called to Rule  
51 of the Supreme court which is, however, applicable only to a  
motion made under §48 of the Civil Practice act (Smith-Hurd Anno.  
Stats., ch. 110, par. 173; and par. 232-31 p. 247) which provides  
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ligations of the contract. The execution and delivery of the deed  
was only a part of the whole transaction. Defendant took title to

the property under the terms of the trust by which it was originally conveyed from H. O. Stone & Company to the Chicago Trust Company. Like its predecessors in title by a court proceeding defendant obtained a decree which declared its right to collect amounts due under the contract and execute deeds pursuant thereto. The manifest purpose of the conveyance was to enable defendant to carry out the terms of the contract, otherwise the transaction was a palpable fraud, which we will not presume was intended.

Defendant says plaintiffs were required to prove the actual case alleged by their pleadings and could not recover by proving some other right. Buckley v. Mandel Bros., 333 Ill. 369, 373; Hamilton Co. v. Channell Chemical Co., 327 Ill. 362, and other cases. The reason for that rule is well stated in United Cork Co. v. Volland, 365 Ill. 564, 573, to be "that the defendant may not be subjected to another action and recovery for the same cause." Such a wrong to defendant is not possible under the pleadings in this case.

It is argued that the Finance Company, as agent for defendant, was without authority to commit its principal with reference to the performance of the contract. Authority is abundantly shown in an additional abstract filed by plaintiffs. This shows the Finance Company was authorized to finance the property covered by the declaration of trust, to receive payments, to declare forfeitures, to institute suits, reinstate pledged contracts, make agreements altering and modifying contracts already made, allow discounts, reduce monthly payments, employ agents and clerks and sell "any of the unsold property." We hold the Finance Company was duly authorized.

In this case, as in the former case mentioned between the parties, we agree with the statement of the opinion filed by the Second Division to the effect that to hold under the circumstances of this case the liability for carrying out the agreement of H. O. Stone & Company was not expressly assumed "would be a denial of justice." In that case leave to appeal was denied by the Supreme court.

The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McSurely, J. concur.

the property under the terms of the trust by which it was originally conveyed from H. O. Stone & Company to the Chicago Trust Company. Like its predecessors in title by a court proceeding defendant obtained a decree which declared its right to collect amounts due under the contract and execute deeds pursuant thereto. The main purpose of the conveyance was to enable defendant to carry out the terms of the contract, otherwise the transaction was a palpable fraud, which we will not presume was intended.

Defendant says plaintiffs were required to prove the actual case alleged by their pleadings and could not recover by proving some other right. Buckley v. Mandel Bros., 333 Ill. 392, 373; Hamilton Co. v. O'Connell Chemical Co., 327 Ill. 332, and other cases. The reason for that rule is well stated in United Dry Goods Co. v. Voland, 333 Ill. 394, 375, to be "that the defendant may not be subjected to another action and recovery for the same cause." Such a wrong to defendant is not possible under the pleadings in this case.

It is argued that the Finance Company, as agent for defendant, was without authority to commit the principal with reference to the performance of the contract. Authority is abundantly shown in an additional abstract filed by plaintiffs. This shows the Finance Company was authorized to finance the property covered by the declaration of trust, to receive payments, to declare foreclosures, to institute suits, reinstate pledged contracts, make agreements altering and modifying contracts already made, allow discounts, reduce monthly payments, employ agents and clerks and sell "any of the unsold property." We hold the Finance Company was fully authorized.

In this case, as in the former case mentioned between the parties, we agree with the statement of the opinion filed by the Second Division to the effect that to hold under the circumstances of this case the liability for carrying out the agreement of Stone & Company was not expressly assumed "would be a denial of justice." In that case leave to appeal was denied by the supreme court.

41777

LAWRENCE NATALI,

Appellee,

APPEAL FROM

v.

CIRCUIT COURT,

AMELIA NATALI,

Appellant.

COOK COUNTY.

3101A.540<sup>2</sup>

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal (here by transfer from the Supreme court) is by defendant from a decree granting partition and stating an account of the income from premises described in the complaint and decree. The decree finds the parties are owners of the premises in equal parts, in fee simple and in joint tenancy. It finds defendant's one-half interest is subject to a lien for \$4637.54, which in case of sale is to be paid out of defendant's share of the proceeds. The cause was heard on exceptions to the report of a master, which with a single exception hereafter mentioned, was confirmed.

Plaintiff and defendant were husband and wife. Their relations were militant with occasional armistices. The property is largely the result of their joint labors and contributions. April 13, 1938, plaintiff Lawrence Natali obtained a divorce for wilful desertion. Answering this complaint for partition defendant asked leave to file a bill to review the divorce decree. This is denied by the present decree, but she does not complain on that ground.

Defendant argues the court erred in finding on the accounting she was liable for \$4637.54. This sum is made up of two items. First, the decree finds part of the land is subject to a mortgage for \$6000, one-half of which (\$3000) should be charged to defendant. Second, the decree finds that from July 25, 1934, until the appointment of a receiver for the premises, plaintiff collected rents in the sum of \$9143.21 and made expenditures of \$12,418.29, leaving a deficiency of \$3275.08, one-half of which (\$1637.54) is charged to defendant. Defendant contends neither item should have been charged to her. As to the mortgage she says it was in fact

LAWRENCE NATALI, Appellee,  
v.  
AMELIA NATALI, Appellant.

CIRCUIT COURT,  
COOK COUNTY.

APPEAL FROM

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal (here by transfer from the Supreme court) is by defendant from a decree granting partition and stating an account of the income from premises described in the complaint and decrees. The decree finds the parties are owners of the premises in equal parts, in fee simple and in joint tenancy. It finds defendant's one-half interest is subject to a lien for \$4837.54, which in case of sale is to be paid out of defendant's share of the proceeds. The cause was heard on exceptions to the report of a master, which with a single exception heretofore mentioned, was confirmed. Plaintiff and defendant were husband and wife. Their relations were militant with occasional amities. The property is largely the result of their joint labors and contributions. April 13, 1938, plaintiff Lawrence Natali obtained a divorce for wilful desertion. Answering this complaint for partition defendant asked leave to file a bill to review the divorce decree. This is denied by the present decree, but she does not complain on that ground. Defendant argues the court erred in finding on the accounting she was liable for \$4837.54. This sum is made up of two items. First, the decree finds part of the fund is subject to a mortgage for \$8000, one-half of which (\$4000) should be charged to defendant. Second, the decree finds that from July 28, 1934, until the appointment of a receiver for the premises, plaintiff collected rents in the sum of \$9113.81 and made expenditures of \$11,411.92, leaving a deficiency of \$2373.08, one-half of which (\$1187.54) is charged to defendant. Defendant contends neither item should have been charged to her. As to the mortgage she says it was in fact

paid and as to the account she says the expenditures made by plaintiff which enhanced the value of the premises are presumed to have been gifts to her, she being at the times in question plaintiff's wife. She cites Walz v. Walz, 325 Ill. 553; Walker v. Walker, 369 Ill. 627, with similar cases. Of the presumption there is no doubt. It is, however, well established that it is a rebuttable presumption. Partridge v. Berliner, 325 Ill. 253; Kartun v. Kartun, 347 Ill. 510; Spina v. Spina, 372 Ill. 50, 22 N. E. (2d) 687. As to the \$6000 mortgage plaintiff's complaint alleged it was an encumbrance against that part of the real estate known as 509-11 S. Kedzie avenue.

Gus Palluci, an employee of plaintiff, answering the complaint said he was the owner of the mortgage. Mrs. Natali, answering on information and belief, denied Palluci was owner and said he was acting for plaintiff who was the real owner, having paid the notes in full. On the hearing John Salari, brother-in-law of Mrs. Natali, testified he was owner of the mortgage and that it was paid to him in full by plaintiff's solicitor, Mr. St. George, to whom he delivered the notes and mortgage. Palluci having theretofore testified he was the owner filed an amended answer stating he never owned the mortgage, and only had it in his possession for a few hours when the securities were given to him before he testified he was owner. He said that after testifying he handed the documents back to plaintiff Lawrence Natali. Mr. St. George did not testify.

The evidence shows plaintiff and defendant both signed the mortgage notes and both were liable thereon. The mortgage or trust deed was never released. The notes were never canceled. Unless, therefore, it should be held the payment made by plaintiff was a gift from <sup>the</sup> husband to the wife (which is not claimed as to this particular item) it would seem only fair and equitable that defendant should be charged with one-half of the mortgage. The record consists of more than 1000 pages. Defendant did not file an adequate abstract. Plaintiff under our rules might have done so upon her default but did not. The matters complained of, namely, the

paid and as to the account she says the expenditures made by plain-  
 tiff which enhanced the value of the premises are presumed to have  
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 notes in full. On the hearing John Galani, brother-in-law of Mrs.  
 Natali, testified he was owner of the mortgage and that it was paid  
 to him in full by plaintiff's solicitor, Mr. St. George, to whom he  
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 consists of more than 1000 pages. Defendant did not file an an-  
 swer thereto. Plaintiff under our rules might have done so and  
 her default but did not. The matters complained of, namely, the



mortgage for \$6000 and the amount found due on the accounting for rents and proceeds, each in the last analysis presents issues of facts. In stating the account the court allowed plaintiff \$951.30 for attorneys' fees and costs paid out in a mechanic's lien suit. Defendant does not complain of this item which, however, was not allowed by the master. The rest of the account has been approved by the master and the chancellor. It is the law in this state that the finding of a master approved by the chancellor is not to be disturbed on appeal unless clearly and manifestly against the weight of the evidence. Stasch v. Stasch, 355 Ill. 581; Pasedach v. Auw, 364 Ill. 491; Smuk v. Hryniewiecki, 369 Ill. 556; Brainard v. Brainard, 373 Ill. 459; Litwin v. Litwin, 375 Ill. 90; Wagner v. Maguire, 297 Ill. App. 48; Metropolitan Life Ins. Co. v. Shattas, 298 Ill. App. 336; Zamis v. Hanson, 302 Ill. App. 404. Defendant has not pointed out any evidence which would justify a reversal on the issues of fact under this rule.

It is urged the decree is erroneous in allowing solicitors' fees contrary to §40, chapter 106 of the Illinois Revised Statutes because the pleadings did not properly set forth the interests of the respective parties. Plaintiff replies the decree does not order the payment of solicitors' fees to either party nor apportion the costs. This seems to be true although there is a finding as to the reasonable fees of solicitors for both parties. The decree of sale (we notice) while directing distribution does not order payment of solicitors' fees to either party. In view of plaintiff's disavowal further discussion of this point is unnecessary.

Defendant finally argues the decree must be reversed because proofs do not correspond to the pleadings with reference to the ownership of the \$6000 mortgage. Cases such as Townsend v. Townsend, 362 Ill. 384, are cited. It is urged the rule should be applied here because the proof showed plaintiff was owner of the \$6000 note instead of Gus Palluci. We have already seen the

mortgage for \$8000 and the amount found due on the accounting for rents and proceeds, each in the last analysis presents issues of facts. In stating the account the court allowed plaintiff \$81.50 for attorneys' fees and costs paid out in a mechanic's lien suit. Defendant does not complain of this item which, however, was not allowed by the master. The rest of the account has been approved by the master and the chancellor. It is the law in this state that the finding of a master approved by the chancellor is not to be disturbed on appeal unless clearly and manifestly against the weight of the evidence. Stach v. Stach, 325 Ill. 581; Paedach v. Ann, 384 Ill. 491; Bank v. Hyvlewski, 329 Ill. 552; Brinard v. Brinard, 373 Ill. 459; Witt v. Witt, 375 Ill. 90; Wagner v. Wagner, 397 Ill. App. 48; Metropolitan Life Ins. Co. v. Whitten, 328 Ill. App. 338; Smith v. Hanson, 302 Ill. App. 404. Defendant has not pointed out any evidence which would justify a reversal on the issues of fact under this rule.

It is urged the decree is erroneous in allowing solicitors' fees contrary to §40, chapter 108 of the Illinois Revised Statutes because the pleadings did not properly set forth the interests of the respective parties. Plaintiff replies the decree does not order the payment of solicitors' fees to either party nor apportion the costs. This seems to be true although there is a finding as to the reasonable fees of solicitors for both parties. The decree of sale (we notice) while directing distribution does not order payment of solicitors' fees to either party. In view of plaintiff's disclaimer further discussion of this point is unnecessary.

Defendant finally argues the decree must be reversed because proofs do not correspond to the pleadings with reference to the ownership of the \$8000 mortgage. Cases such as Townsend v. Townsend, 328 Ill. 384, are cited. It is urged the rule should be applied here because the proof showed plaintiff was owner of the \$8000 note instead of Gus Pallard. We have already seen the

question of ownership of this note was immaterial as to the real issues between the parties. We will not reverse because the pleadings and proof do not correspond on an immaterial issue.

Plaintiff asserts cross-error contending defendant owes him on the accounting \$13,201.52. Plaintiff has moved to dismiss the appeal because of the inadequate abstract furnished. Manifestly, if he seriously wished to have a claim of this kind considered, in view of the voluminous and complicated record he would have supplied an adequate abstract. This alleged error invites us to a long journey without ~~charter~~ or compass. We decline the invitation.

The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McSurely, J. concur.

question of ownership of this note was immaterial as to the real issues between the parties. We will not reverse because the findings and proof do not correspond on an immaterial issue. Plaintiff asserts cross-error conceding defendant owes him on the accounting \$18,801.62. Plaintiff has moved to dismiss the appeal because of the inadequate abstract furnished. Manifestly if he seriously wished to have a claim of this kind considered, in view of the voluminous and complicated record he would have supplied an adequate abstract. This alleged error invites us to a long journey without shelter or compass. To decline the invitation, the judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, P.J., and McNulty, J. concur.

CATHERINE SWEGLO and GOLDIE  
STEINBERG,

v.

MINNIE MIKOLON, JOHN PROSTKA  
and LUDWIKA PROSTKA.

MINNIE MIKOLON,

Appellee,

v.

JOHN PROSTKA and LUDWIKA  
PROSTKA,

Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

310 I.A. 541

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a partition suit in which there was a sale of the property; John and Ludwika Prostka, judgment creditors of Minnie Mikolon, claimed a lien of \$1164.84, with interest, on her share of the proceeds of the sale; the court held that their lien was subject to her homestead rights and ordered \$1000 to be paid to her, and the balance of the proceeds - \$42.21, to be applied on the Prostka judgment. They appeal from this order.

Examination of the record shows that the court was without jurisdiction to enter any order touching the claim of the judgment creditors.

July 16, 1940, the complaint for partition was filed by plaintiffs, Minnie Mikolon being the sole defendant; it alleged that the two plaintiffs were each vested with a one-fourth interest in the property and defendant Mikolon with a one-half interest; that the premises were owned in common by the parties to the suit and no other person or persons had any interest in the premises; that it consisted of a lot 25 x 125 feet located at 4507 S. Whipple street, Chicago, improved with a one-story brick building; that in case this cannot be divided among the owners without injury it should be sold and the proceeds be divided among the parties according to their respective rights and interests. There was the usual prayer that commissioners be appointed, and in case division could not be

CATHARINE SWENSON and GOLDIE  
 STEINBERG  
 v.  
 MINNIE NIKOLSON, JOHN PROSKA  
 and LUDWIG PROSKA  
 MINNIE NIKOLSON  
 v.  
 JOHN PROSKA and LUDWIG  
 PROSKA  
 Appellants.

APPEAL FROM  
 SUPERIOR COURT,  
 COOK COUNTY.

MR. JUSTICE MEADWELL DELIVERED THE OPINION OF THE COURT.

This is a partition suit in which there was a sale of the  
 property; John and Ludwig Proska, judgment creditors of Minnie  
 Nikolson, claimed a lien of \$184.44, with interest, on her share of  
 the proceeds of the sale; the court held that their lien was sub-  
 ject to her homestead rights and ordered \$100 to be paid to her,  
 and the balance of the proceeds - \$84.44, to be applied on the  
 Proska judgment. They appeal from this order.  
 Examination of the record shows that the court was with-  
 out jurisdiction to enter any order touching the claim of the judg-  
 ment creditors.

July 26, 1940, the complaint for partition was filed by  
 plaintiff, Minnie Nikolson being the sole defendant; it alleged that  
 the two plaintiffs were each vested with a one-fourth interest in  
 the property and defendant Nikolson with a one-half interest; that  
 the premises were owned in common by the parties to the suit and no  
 other person or persons had any interest in the premises; that it  
 consisted of a lot 25 x 125 feet located at 4507 N. Lincoln street,  
 Chicago, improved with a one-story brick building; that in 1938  
 this cannot be divided among the parties without injury it should be  
 sold and the proceeds be divided among the parties according to  
 their respective rights and interests. There was the usual prayer  
 that commissioners be appointed, and in case division could not be

made that the premises be sold under the direction of the court and the proceeds be divided among the owners. Summons was issued and served on defendant Minnie Mikolon on July 17, 1940. Apparently defendant conceded all the facts alleged in the complaint and, consenting to the partition, filed no appearance or answer.

Subsequently, on August 2, 1940, without notice to defendant Mikolon, leave was given plaintiffs to file instant an amendment to the complaint. This amendment asserted that John and Ludwika Prostka claimed to have some interest in the property as judgment creditors, lienors or otherwise, and summons issued against them.

September 3, 1940, the Prostkas filed an answer asserting that they had a judgment against Minnie Mikolon for \$1164.84, that execution had been issued on it and that it was a first and prior lien on the interest in the premises owned by her. The answer asked that in the event of a sale of the premises the lien of their judgment be held to be a lien prior to her interests.

September 6, a decree of partition was entered finding that the plaintiffs each owned a one-fourth interest in the premises and defendant Mikolon a one-half interest, all as tenants in common; the decree also found that the half interest of Minnie Mikolon in the property was subject to the Prostka judgment; it appointed commissioners to partition the premises. The commissioners filed a report fixing the value of the premises at \$4500 and stating that a division of the premises could not be made. The report of the commissioners was later confirmed, and September 20, a decree was entered ordering that the property be sold and the money realized from the sale be brought into court and distributed to the parties entitled to it. Subsequently the master reported the sale of the premises for \$4000, which was later confirmed.

The master then made a report of distribution showing that after paying all expenses there remained in his hands, as the share of Minnie Mikolon, \$1042.21. November 8, 1940, this report was approved and confirmed, and on the same date it was ordered that there

made that the premises be sold under the direction of the court and the proceeds be divided among the owners. Summons was issued and served on defendant Minnie Mikolon on July 17, 1940. Apparently defendant conceded all the facts alleged in the complaint and, consenting to the partition, filed no appearance or answer.

Subsequently, on August 2, 1940, without notice to defendant and Mikolon, leave was given plaintiff to file instant an amendment to the complaint. This amendment asserted that John and Ludwig Prostka claimed to have some interest in the property as judgment creditors, lienors or otherwise, and summons issued against them. September 3, 1940, the Prostkas filed an answer asserting that they had a judgment against Minnie Mikolon for \$184.84, that execution had been issued on it and that it was a first and prior lien on the interest in the premises owned by her. The answer asked that in the event of a sale of the premises the lien of their judgment be held to be a lien prior to her interests.

September 6, a decree of partition was entered finding that the plaintiffs each owned a one-fourth interest in the premises and defendant Mikolon a one-half interest, all as tenants in common; the decree also found that the half interest of Minnie Mikolon in the property was subject to the Prostka judgment; it appointed commissioners to partition the premises. The commissioners filed a report fixing the value of the premises at \$4800 and stating that a division of the premises could not be made. The report of the commissioners was later confirmed, and September 30, a decree was entered ordering that the property be sold and the money realized from the sale be brought into court and distributed to the parties entitled to it. Subsequently the master reported the sale of the premises for \$4800, which was later confirmed.

The master then made a report of distribution showing that after paying all expenses there remained in his hands, as the grant of Minnie Mikolon, \$1042.21. November 8, 1940, this report was approved and confirmed, and on the same date it was ordered that there



should be paid to Harry Blossat, attorney for the Prostkas, in partial payment of their judgment, \$1042.21, the share of Minnie Mikolon in the proceeds of the sale. All of these proceedings were without any notice to or knowledge of defendant Minnie Mikolon, so far as shown by the record.

Subsequently a writ of assistance was issued in favor of the purchaser of the premises and against defendant Minnie Mikolon, ousting her from possession of the premises. Thereupon she filed a motion asking the court to hold her distributive share of the proceeds of the sale until the further order of the court, which was ordered.

December 16, 1940, Minnie Mikolon filed her petition asserting that she was entitled to her homestead right in the premises of \$1000; that the complaint filed in the cause disregarded the homestead rights of petitioner in the premises, and the various decrees and orders entered did not consider this. She asked that the writ of assistance be quashed and the master in chancery be ordered to pay her \$1000 as her homestead interest. The Prostkas answered this, denying she was entitled to the money in the hands of the master. Subsequently the writ of assistance was quashed.

January 8, 1941, after hearing, an order was entered finding she was entitled to a homestead interest prior to the rights of the Prostkas as judgment creditors; the master was ordered to pay \$1000, the value of the homestead, to the attorney for Minnie Mikolon, and the excess of \$42.21 to the attorney for the Prostkas. They appeal from this order.

Where an amendment is a matter of substance a defendant should not be defaulted until he has been ordered to plead to the complaint as amended. Dahlin v. Maytag Co., 238 Ill. App. 85; Gage v. Brown, 125 Ill. 522; Adams v. Gill, 158 Ill. 190. Here for the first time, after the filing of the original complaint, an issue between the Prostkas, judgment creditors, and defendant Mikolon, was presented by an amendment to the complaint. She was entitled to

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January 9, 1941, after hearing, an order was entered finding she was entitled to a homestead interest prior to the rights of the Proskas as judgment creditors; the master was ordered to pay \$1000, the value of the homestead, to the attorney for Minnie Nikolov, and the excess of \$48.21 to the attorney for the Proskas. They appeal from this order.

Where an amendment is a matter of substance a defendant should not be defeated until he has been ordered to plead to the complaint as amended. Dahlin v. Meyer Co., 238 Ill. App. 22; gake v. Brown, 125 Ill. 322; Adams v. Gill, 128 Ill. 180. Here for the first time, after the filing of the original complaint, an issue between the Proskas, judgment creditors, and defendant Nikolov, was presented by an amendment to the complaint. She was entitled to

notice of the filing of this amendment, and having failed to receive notice, all the subsequent orders with reference to this issue were void. It would be a gross injustice to permit a party not a party to the original complaint, but made a party by a subsequent amendment, to make a claim of interest against one of the owners of the premises involved without notice to her of such claim. Minnie Mikolon was entitled to her day in court.

Respective counsel have presented much argument on the question of whether defendant Mikolon was entitled to a homestead. Without discussing the evidence on this question we have examined it and are of the opinion the chancellor correctly held that she was entitled to a homestead.

It is claimed that no judgment or decree will be amended after 30 days from its entry. It is well settled that any judgment or decree, void because of lack of jurisdiction, may be attacked at any time.

For the reasons indicated the order of the trial court is affirmed.

ORDER AFFIRMED.

O'Connor, P.J., and Matchett, J. concur.

notice of the filing of this amendment, and having failed to receive notice, all the subsequent orders with reference to this issue were void. It would be a gross injustice to permit a party not a party to the original complaint, but made a party by a subsequent amendment, to make a claim of interest against one of the owners of the premises involved without notice to her of such claim. Minnie Mikolon was entitled to her day in court.

Respective counsel have presented much argument on the question of whether defendant Mikolon was entitled to a hearing. Without discussing the evidence on this question we have examined it and are of the opinion the chancellor correctly held that she was entitled to a hearing.

It is claimed that no judgment or decree will be entered after 30 days from its entry. It is well settled that any judgment or decree, void because of lack of jurisdiction, may be attacked at any time. For the reasons indicated the order of the trial court is affirmed.

ORDER AFFIRMED.

O'Connor, P.J., and Latchett, J. concur.

Abstract

STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

February Term, A. D. 1941

Term No. 41F10

Agenda No. 2

MARTHA TAAKE SMITH,

Plaintiff-Appellee

Appeal from the

vs.

City Court of Alton,

I. B. CURRAN,

Madison County,

Defendant-Appellant.

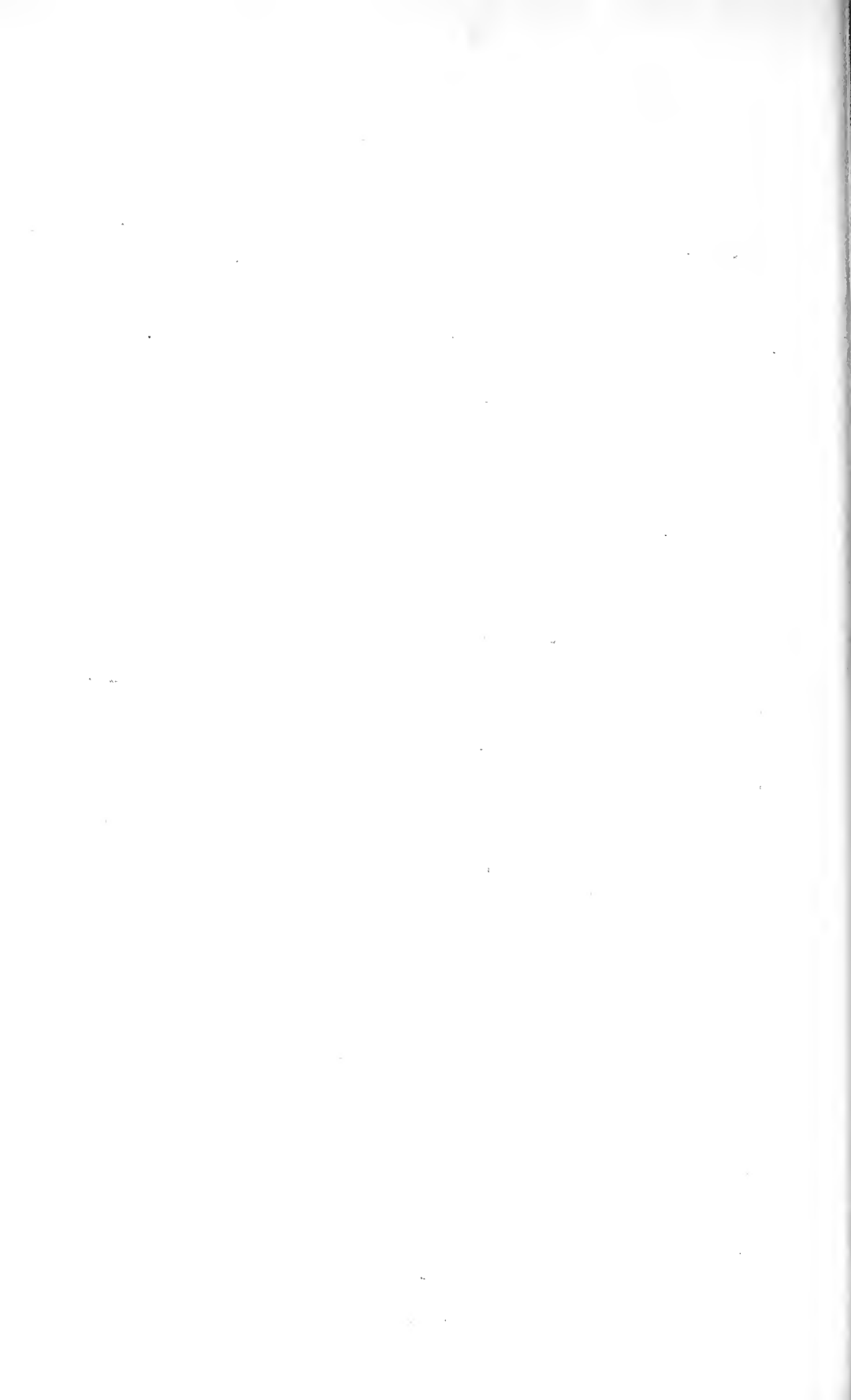
Illinois.

STONE, P. J.

310 I.A. 607<sup>1</sup>

Plaintiff, who is the appellee, obtained a verdict of a jury in the sum of \$1,075.00, in the City Court of Alton, against defendant, who is the appellant, in an action brought to recover wages claimed to be due plaintiff as housekeeper for defendant, and for several other minor items. Upon the consideration of the motion for new trial the Court ordered a remittitur in the amount of \$375.00. This order was complied with and the Court entered judgment for \$700.00 and costs of suit, from which judgment defendant prosecutes his appeal to this court.

Plaintiff testified that defendant had employed her at a wage of \$5.00 a week, that he paid her wages up until the 6th of June, 1935, but that he thereafter failed to pay the amount due her, under their alleged agreement. Plaintiff also testified that she had advanced \$30.00 on account of the purchase of a sewing machine, and that defendant had disposed of said machine and had not returned her the \$30.00. There was in addition thereto a claim on the part of plaintiff, for certain amounts expended by her, for papering and plastering ordered done by her, at defendant's home, and for the value of a small amount of lumber which plaintiff claimed belonged to her, but was used by defendant.



Defendant's theory of the case, and his testimony was to the effect that he had allowed plaintiff to come to his home largely as a matter of accommodation to her and her family and because she had no other place to go; that she and her children had the run of the house; that he made various expenditures for and on behalf of her and her family; that he paid various bills for her, including nurse's bills. In his testimony defendant admitted that plaintiff had advanced \$30.00 on account of the purchase of said sewing machine, but claimed that said sewing machine, was purchased largely for plaintiff's use, but that he offered to return the \$30.00 to plaintiff if she would pay certain bills which had been contracted for utility services during his absence.

It is alleged as error that plaintiff introduced evidence on the trial of the cause which was highly prejudicial, and which was intended to, and did prejudice the jury against defendant. Specific complaint is made of the testimony of the witness, Mary Eisenreich, called in rebuttal, on behalf of plaintiff. Cross-examination of defendant's counsel was calculated to develop the theory of defendant, that plaintiff and her children were in the home of the defendant as an accommodation, and that defendant had been kind to plaintiff's children. On re-direct examination witness was asked about defendant's ill treatment of one of the children, and testified to an occasion when he struck the girl and she was unable to go to school for a few days. She further testified that she knew this because her daughter told her so. To which objection was made by counsel for defendant, that such evidence was heresay and asked that the court instruct the jury to disregard it, and the court immediately did instruct the jury to disregard that part of the testimony, as heresay. Inasmuch as the court instructed the jury to disregard this part of the testimony, any error therein would be cured. I.C.R.R. Co. vs. Bailey 222 Ill. 480. This is particularly true, because of the fact that this correction was made immediately and before the case had been argued to the jury.

It is alleged that the Court erred in the admission of the





testimony of the witness, Dr. W. W. Billings, another rebuttal witness for plaintiff. In answer to question of counsel, witness testified that he found a long standing injury of three or four weeks to the little finger of one of the children of plaintiff, based upon the history of the case given him. Objection was made to the latter part of the testimony, which was sustained by the court. Witness then volunteered further information along the same lines, which was again objected to and objection again sustained by the court. Defendant, in rebuttal took the stand and developed this subject himself. There can be no error in this. A party who calls and examines a witness at a trial concerning matters introduced in evidence by the opposite party, cannot object on appeal that the introduction of such evidence was error, he having participated therein. *Stevick vs. Vennum*, 227 Ill. App. 86. Certainly no error can be predicated where proper objection has been made and objection sustained by the court.

As to error urged, that the verdict of the jury was against the weight of the evidence, the jury saw the witnesses and heard them testify. Their opportunities to determine credibility are infinitely greater than appellate judges who study the hard type of the printed page. Where there is a contrariety of evidence and the testimony by fair and reasonable intendment will authorize a verdict, a court of review will not set it aside. *Carney vs. Sheevy* 295, Ill. at 83; *Roth vs. Flack* 224 Ill. App. at 399. Where a fair question of fact is raised by the proof this court has consistently held that the jury's finding will not be set aside as against the manifest weight of the evidence. *Summers vs. Hendricks* 300 Ill. App. 498; *Rich vs. Albrecht*, 300 Ill. App. 493; *Jones vs. Esenberg* 299 Ill. App. 551; *Gregory vs. Merriam* 294 Ill. App. 483.

Upon the record, the trial court did not err in refusing to grant a new trial. Finding no reversible error, the judgment of the lower court will be affirmed.

AFFIRMED.

FILED

MAY 31 1941



# Abstract

STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

February Term, A. D. 1941

Term No. 41F16.

Agenda No. 11.

OWEN CUMMINGS,

Plaintiff-Appellant,

vs.

ARLIE FLORO, as Administrator  
of the Estate of William Carl  
Choisser, Deceased,

Defendant-Appellee.

810 I.A. 607<sup>2</sup>

Appeal from the

Circuit Court of

Franklin County.

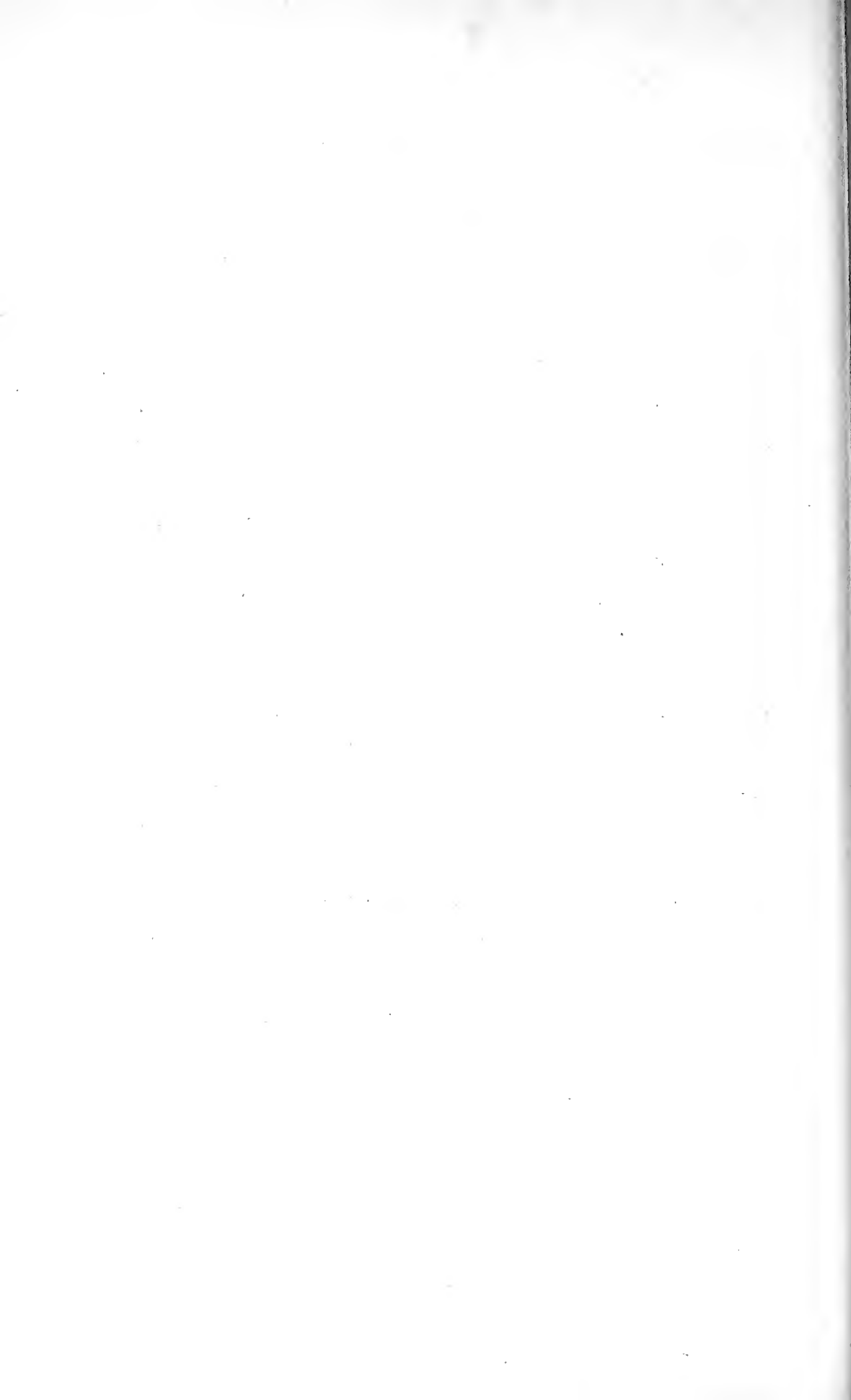
DADY, J.

The county court of Franklin County entered a judgment denying the claim of the plaintiff-appellant, hereinafter referred to as "claimant," filed in that court against the estate of William Carl Choisser, deceased.

An appeal was taken to the circuit court and by agreement a transcript of the evidence introduced in the county court was admitted in evidence in the circuit court. No other evidence was offered or introduced in the circuit court. The record fails to show any objection made by either party in the circuit court to any part of the evidence included in such transcript or that any ruling was made by the circuit court on the admission or rejection of any of the evidence shown by such transcript. With this transcript before it, the circuit court entered judgment denying the claim, from which judgment the claimant brings this appeal.

The claim was filed on February 14, 1940, and stated that it was for "money loaned to deceased, \$1200.00," on September 6, 1939, The decedent died sometime in October, 1939, leaving a widow.

The claimant, being an incompetent witness, was not permitted to testify. No objection is made to such ruling. Only two other witnesses testified for the claimant, viz., Ewing Choisser



and Steve Choisser, who were respectively the father and brother of the deceased.

Ewing Choisser testified that on September 5, 1939, the deceased told him he needed some money; that he told the deceased he thought he could help him get it; that about four p. m. of that day he and the deceased went to the home of the claimant, at which time the decedent and the claimant talked about a loan; that he told the claimant that the decedent wanted some money for a few days, and the claimant said he would bring the money up the next day; that the next day the claimant brought the money, \$1200.00, to the office of the deceased; that when the claimant first came into such office there were present, the claimant, the decedent and the witness; that while the money was being counted Steve Choisser came into the office and the decedent then told Steve Choisser he was borrowing the money from the claimant, and Steve Choisser then left; that nothing was said at that time what the money was for; that some time later he asked decedent if he had paid the claimant back and decedent said he had not. On cross examination this witness further testified that when he and the decedent first went to the claimant, the witness told the claimant, "I would see that he got the money back." He further testified, "I stood good for the payment, I am still standing good for the money. \* \* \* I don't figure this is my debt, but I will pay it if it is not paid out of the estate. \* \* \* I have no further interest in the estate of my son Carl unless the suit is to go against us. I will have a suit because somebody has to pay the money back."

Steve Choisser testified that on September 6, 1939, he went into the office of decedent to see the decedent, and that at that time the decedent and the claimant and the father, Ewing Choisser, were there; that the decedent had a lot of money on the table and the decedent said, "Look here, Steve," and the witness said, "Where did you get all that," and the decedent said he was borrowing it from the claimant. He further testified that there



was \$1200.00 in twenty dollar bills, and that the decedent counted it and put it in his pocket.

The foregoing is a fair statement of all the evidence material to the issues.

The county court ruled that the testimony of Ewing Choisser should be stricken from the record on the ground that he was directly interested in the result of the litigation and, therefore, an incompetent witness under the statute. The parties have taken the position before us that the circuit court also struck the testimony of this witness, and that the issue is here presented whether such testimony should have been received.

Defendant contends that the witness Ewing Choisser, by reason of his admitted promise to pay the alleged loan, was a person "directly interested in the event" of the present suit and therefore incompetent to testify in behalf of the claimant because of the provisions of Section 2 of our Statute on "Evidence and Depositions." (Rev. Stat's., 1939, Ch. 51), which section provides that "No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, \* \* \* when any adverse party sues or defends as \* \* \* administrator \* \* \* of any deceased person \* \* \*."

The test of interest which determines the competency of a witness under such section of the statute is whether he will gain or lose as a direct result of the suit. (Wetzel v. Firebaugh, 251 Ill. 190). The disqualification provided by this section applies to a witness directly interested in the outcome of the litigation, although not a party to it. (Chicago Daily News v. Kohler, 360 Ill. 351). It has been held that a witness will be disqualified by interest if he may be liable for a claim asserted against a decedent's estate in case the claim is not allowed against the estate. (In re Estate of Vander Syde, 187 Ill. App. 94; In re Estate of Purefoy, 256 Ill. App. 523; Skeen v. Moore, 120 Ga. 1057, 48 S.E. 425). In Grommes v. St. Paul Trust Co., 147 Ill. 634,

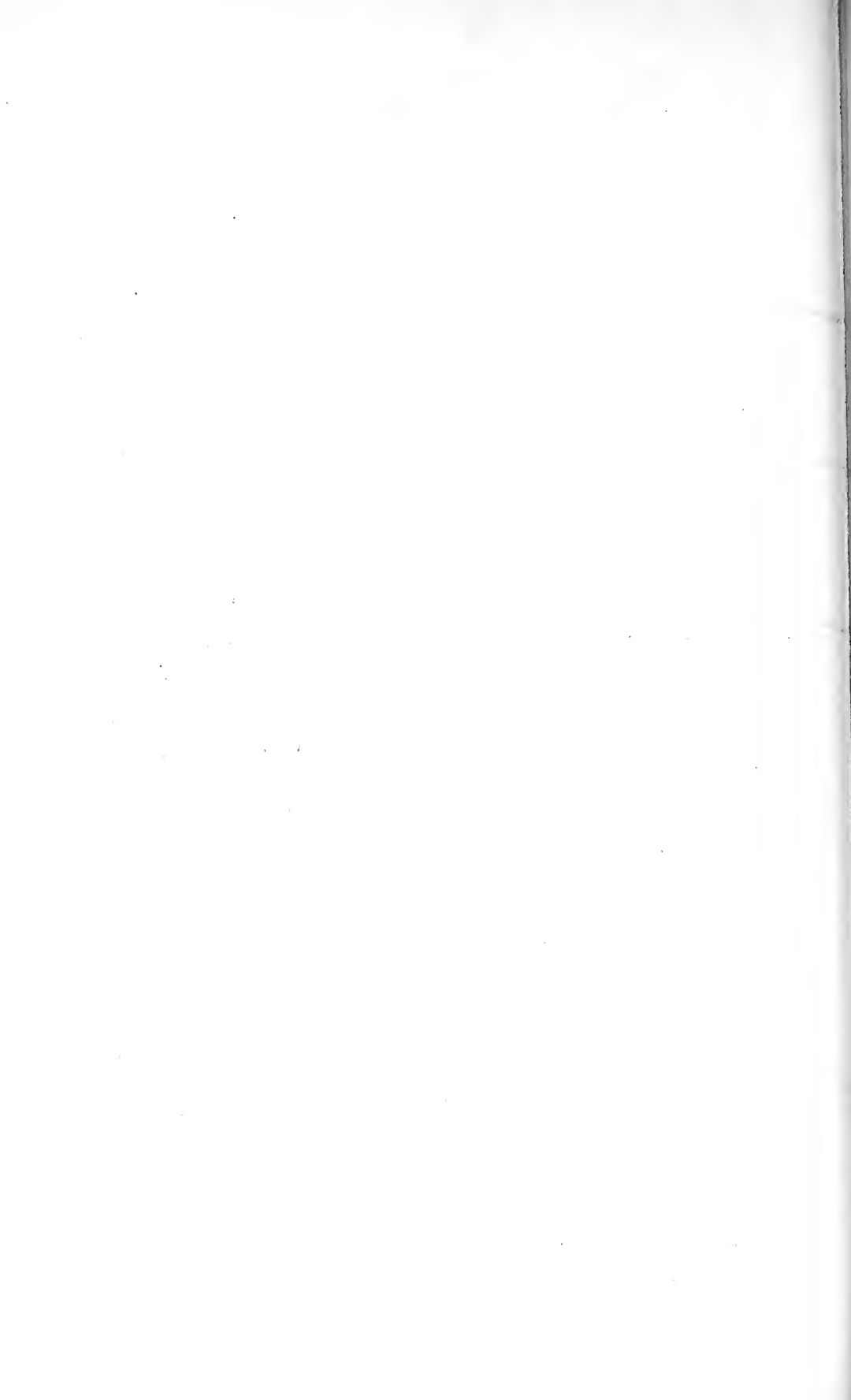




which was a suit by the executors of an estate of a deceased lessor against the guarantors on a lease for the recovery of rent, the lessee was held incompetent to testify against the estate because he was liable to respond to his guarantors and was therefore a person directly interested in the event of the suit.

Assuming the testimony of Ewing Choisser to be true, as we are required to assume in passing upon his competency as a witness, then, in our opinion, he was, as a matter of law, liable to the claimant either on an original promise (see *Hartley v. Varner*, 88 Ill. 561) or on a collateral promise. (see *Blank v. Dreher*, 25 Ill. 331). In our opinion it is not necessary for us to pass upon the question of whether his promise to the claimant was an original or a collateral promise. In either event he was directly interested in having the claim allowed and thereafter paid from the funds of the estate, for he would thereby be relieved from his responsibility on his promise.

The claimant in effect admits that Ewing Choisser would not be competent if he were liable to the claimant on such promise, but urges that the oral promise of Ewing Choisser was merely a promise to answer for the debt of another, and was therefore unenforceable by virtue of Sec. 1 of our statutes on "Frauds and Perjuries." (Rev. Stat's., 1939, Ch. 59), and that therefore Ewing Choisser was not legally liable on such promise and was not interested in the allowance of the claim. The same contention as that made by the claimant in this case, except that the defense relied on was the Statute of Limitations instead of the Statute of Frauds, was passed upon in *Culbertson v. Salinger & Brigham*, 131 Iowa, 307, 108 N.W. 454, in which case the court held that such defense was without merit and said "The statute of limitations does not pay a debt, nor is it to be considered unless pleaded. To support appellant's contention in this respect we shall have to assume that the statute would be pleaded were action brought by Culbertson against the witness, and that nothing had been done to toll the statute. This, of course, we should not do in determining the proposition



now before us. (Citing cases). A witness in such a situation might be averse to pleading the statute, and the validity of the cause of action and of the witness' interest is in no manner determined by application of the statute of limitations" (Citing cases). The reasoning used by the Iowa court we believe applies in the present case. The Statute of Frauds is not an absolute defense but is personal and may be waived by the person sought to be charged. (McCoy v. Williams, 6 Ill. 584). There is no indication from the present record that the witness would take advantage of this defense if it were available in a suit between him and claimant. In fact there is every indication from the testimony of Ewing Choisser that he intends to pay the loan if it is not paid by the estate.

In our opinion under the limited and particular evidence in this case the trial court properly held that Ewing Choisser was an incompetent witness and did not err in striking out his testimony.

The only remaining question is whether the judgment of the circuit court is contrary to the manifest weight of the evidence.

Excluding from consideration the evidence of Ewing Choisser, the only evidence tending to sustain the claim was that of Steve Choisser. In substance the testimony of this witness was that the decedent in his presence received \$1200.00 in twenty dollar bills and admitted that he was borrowing this money from the claimant. No evidence was introduced which in any way contradicted this testimony. By denying the claim it is apparent that the circuit court entirely disregarded this evidence. We are required to consider the propriety of this action.

We recognize the rule that the burden of proving a claim is upon the claimant and that it is the duty of the court to scrutinize with care claims against the estates of deceased persons. (Estate of Teehan, 287 Ill. App. 58) As aptly stated by the court in Laurence v. Laurence, 164 Ill. 367: "Evidence of admissions



made by a person since dead should be carefully scrutinized, and the circumstances under which they were alleged to have been made carefully considered with all the evidence in the case. Such evidence is liable to abuse." (See also *Kosakowski v. Bagdon*, 369 Ill. 252.) We do not think that the rule established by the foregoing cases goes so far as to permit a trial court entirely to disregard the testimony of a witness unless there is some sufficient reason to doubt its credibility.

Defendant argues to sustain the judgment of the trial court that where the evidence is heard in open court, the trial court, by reason of its opportunity to observe the witnesses and their demeanor while testifying, is in a better position to determine the truth of their testimony than the reviewing court. We are in complete agreement with this general rule but it does not apply in this case. No witness testified in the circuit court and the only evidence heard by that court was that shown by the transcript of the evidence taken in the county court. The trial in the circuit court was necessarily a trial de novo and the circuit court could not act as a court of review. (*Wesemann v. Foley*, 231 Ill. App. 104.) The fact that the county court had the opportunity to observe the witness Steve Choisser and pass upon his credibility can have no bearing on the propriety of the action of the circuit court in refusing to consider his testimony. The circuit court had before it only the bare transcript of the county court proceedings, and we do not believe that there was sufficient reason disclosed by such transcript to justify the circuit court in disregarding this testimony. (*Kelly v. Jones*, 290 Ill. 375.)

We do not intend to intimate by anything we have said that a trial court must in all cases accept the testimony of a witness who is not expressly contradicted. Some of the circumstances under which a trial court may disregard the testimony of a witness, even in the absence of any express contradictory evidence, are pointed out in the case of *Quock Ting v. United States*



140 U. S. 417, wherein the court said: "Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by anyone, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving the wrong coloring to material facts. All these things may be properly considered in determining the weight which should be given to his statements, although here be no adverse verbal testimony adduced." (See also *Podolski v. Stone*, 186 Ill. 540; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549.)

Claimant asks that judgment be entered in his favor in this court upon the basis of the testimony of the one witness, Steve Choisser. We cannot say that in another trial of this case more satisfactory evidence might not be produced by both parties and we feel that the ends of justice require that the case be reversed and remanded for a trial de novo.

REVERSED and REMANDED.

FILED

MAY 31 1941

*David J. Mallitt*

CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS





Abstract

STATE OF ILLINOIS  
APPELLATE COURT

February Term, A. D. 1941.

Term No. 41F8

Agenda No. 8

GROVER HAINES,  
Plaintiff-Appellee,

vs.

JOE WELTY and JOE BIANCHINI,  
Defendants-Appellants.

) Appeal from the

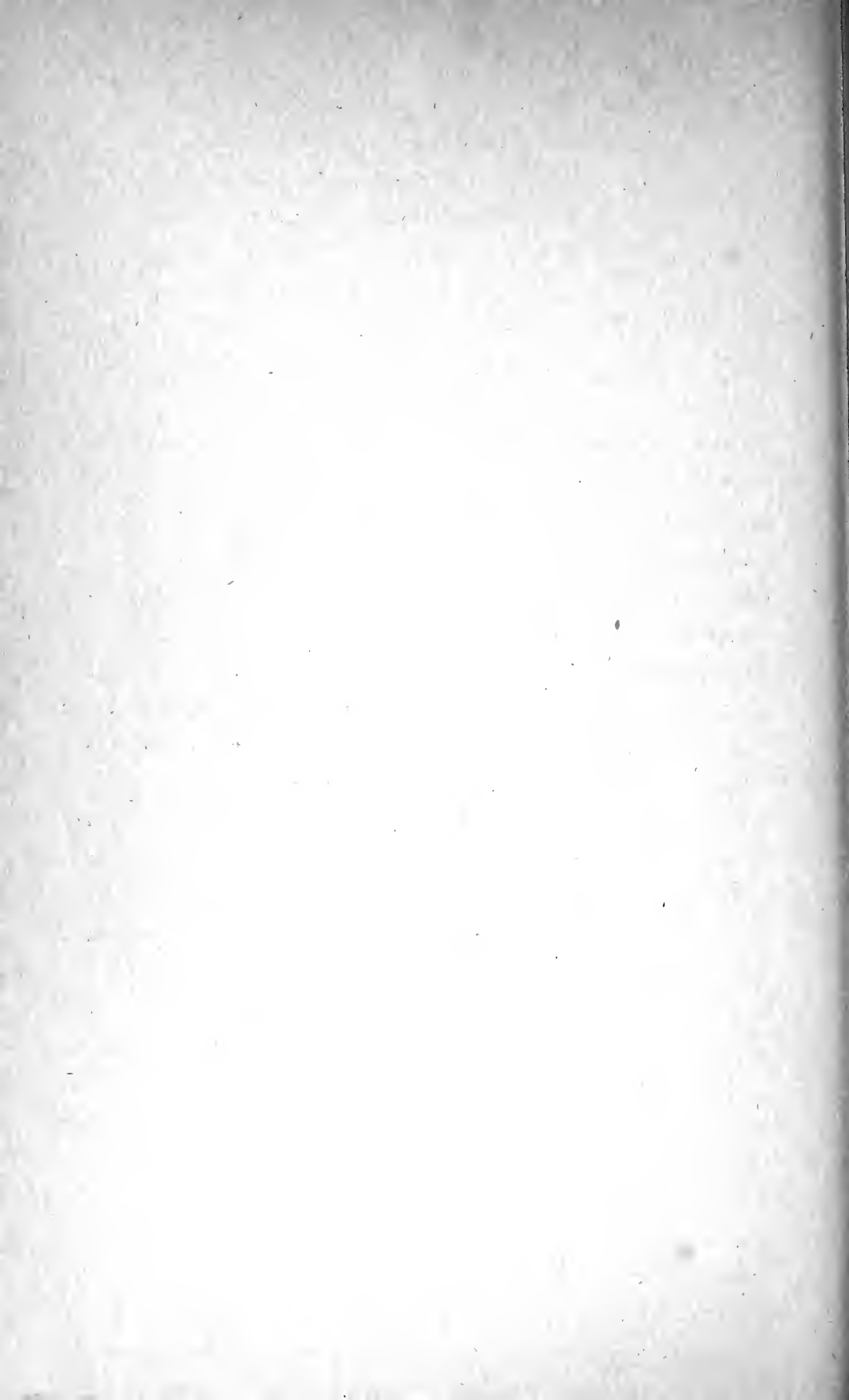
) Circuit Court of

) Williamson County

310 I.A. 608

Dady, J:

Plaintiff, Grover Haines, filed a complaint in the circuit court of Williamson County charging that the defendants Joe Welty, Joe Bianchini and T. N. Sizemore unlawfully and maliciously made an assault upon and beat and wounded the plaintiff with a black jack. Thereafter, on motion of plaintiff, Weldon W. Parker was also made a party defendant. Each defendant filed an answer denying all of the material allegations of the complaint. Bianchini filed an amendment to his answer by which he alleged that the plaintiff made the first assault and that Bianchini used no more force than was reasonably necessary to defend himself. By the amended answer Bianchini also alleged that at the time in question he was duly qualified and acting fireman of the City of Herrin; that there was a custom for firemen in the course of their employment, and in the absence of the regular police officers of said city, to discipline and care for prisoners in the city jail, which adjoined the fire station, whenever prisoners became unruly or used loud and profane language; that at the time in question the plaintiff was a prisoner in the city jail and was using vulgar and obscene language and striking at all persons who passed by his cell; that Bianchini was endeavoring to discipline and place the plaintiff in an individual cell, and that



plaintiff then assaulted and would have injured Bianchini if the latter had not defended himself. The plaintiff filed a reply denying the material allegations of such amended answer.

The jury found all four defendants guilty and assessed the plaintiff's damages at \$500. In answer to special interrogatories the jury found Welty and Bianchini assaulted the plaintiff with a rubber hose with malice, and that Sizemore and Parker did not assault the plaintiff with a rubber hose with malice. The court entered judgment in favor of Sizemore and Parker notwithstanding the verdict, and denied like motions by Welty and Bianchini. The court then entered judgment on the verdict in favor of the plaintiff and against Bianchini and Welty for \$500 and costs. Motions for a new trial by Welty and Bianchini were duly made and overruled. Bianchini and Welty bring this appeal.

Plaintiff, a coal miner aged thirty years, testified that he left his home about nine A. M., on July 2, 1938, and during the day visited several taverns; that about five or six P. M. he was in a tavern drinking and was "pretty drunk," when Shannon, who was chief of police, arrested him and put him in the bull pen in the city jail and then went away; that after Shannon left, Welty and Bianchini were standing in front of the cell door and plaintiff and Bianchini got into an argument; that Bianchini grabbed plaintiff's arm and "tried to break it" and Welty "tried to grab it," but plaintiff jerked loose; that "Sizemore walked in and said something and we kept on arguing"; that one of such three men said "Let me have him," and another said "Let me have him" and the cell door then flew open and Welty, Bianchini and Sizemore came in and "knocked me out," but that he didn't know which one hit him.

Doctor Curry, a dentist, testified that he saw the plaintiff on July 3rd, 1938, but did not treat him; that he observed plaintiff's jaw was injured and swollen and he advised the plaintiff to have an x-ray. Doctor McKee, a physician, testi-



fied that he treated the plaintiff on July 4th and 9th, 1938, and the plaintiff had bruises and abrasions on the left side of his face and jaw and on the right side of his head. Doctor Murrah, a physician, testified that he treated the plaintiff about July 9th; that an x-ray showed that the plaintiff had a fracture of the lower jaw, but that the injury would not be permanent. There was no evidence tending to show that the plaintiff was injured before the time of the alleged assault.

The defendant Bianchini testified that he was 31 years old and weighed 155 pounds; that it was the custom of the firemen to carry keys to the jail; that about five-thirty, before he went off duty, Haines was raising a lot of trouble, cursing and using profane language; that he warned Haines three times to be quiet and told him he would have to put him in a back cell if he didn't keep still; that he then went into the cell with a piece of hose and as soon as he went in "we started scuffling"; that Haines grabbed Bianchini by the tie and had almost choked Bianchini down when Welty came in and jerked Haines off from Bianchini, and they put Haines in a different cell; that he did not inflict any injury upon Haines; that Sizemore and Parker were away at the time; that he did not see Welty strike Haines with anything, and he, Bianchini, did not strike Haines with anything at any time.

The defendant Welty testified that he was 36 years old; that he was assistant fire chief; that it was the custom for firemen to have the custody of prisoners in the absence of the city police; that he reported for work at five o'clock on the day in question; that Bianchini, Parker and Sizemore were there; that he saw Haines in the jail when he came on duty; that Haines was cursing everybody and using profane language; that he went into the office and changed his clothes and came back and saw Haines in the cell; that Haines had Bianchini backed up against the wall, had him by the tie and had just about choked him down; that he saw the rubber hose in Bianchini's right hand; that he pulled Haines off of Bianchini and put



Haines in another cell,- "pushed him back there;" that while he, Wolty, was in the jail, neither Sizemore nor Parker were there, but they had been gone about ten minutes; that he did not rush with any of the other defendants through the door into the bull pen and did not see any of the defendants make any assault with a hose on the plaintiff at any time; that he did not strike Haines at any time, and did not see any one else do so; that Haines had a broken jaw the next morning, but he had not noticed it before that.

Sizemore testified that he noticed Haines in the jail; that Haines was using profane language; that he, Sizemore, did not assault or strike Haines, and did not see any one go into the cell and strike Haines with a rubber hose.

Parker testified that he helped arrest Haines and saw Haines in the city jail, and after he had stepped back into the office he heard Haines using profane language; that he did not strike Haines at any time and did not see any one strike Haines; that he left the jail about six o'clock.

There was other evidence showing it was the custom of the city firemen to look after prisoners in the absence of police officers, and other evidence with reference to plaintiff's intoxication and use of profane language, but we do not consider it necessary or material to recite such evidence.

The defendants contend that the trial court erred in not entering judgment for the defendants notwithstanding the verdict. In passing on such a motion the rule applicable on motions for a directed verdict should be applied. The evidence must be considered in its aspect most favorable to the plaintiff, together with all reasonable inferences therefrom. The evidence cannot be weighed, and all contradictory and explanatory circumstances must be rejected. The only inquiry is whether there is any evidence fairly tending to prove the plaintiff's complaint. (Synwolt v. Klank, 296 Ill. App. 79; Hunter v. Troup, 315 Ill. 293.) In our opinion there was ample evidence tending to prove





plaintiff's complaint and the trial court did not err in denying such motions for a judgment notwithstanding the verdict.

The defendants next contend that the verdict was against the manifest weight of the evidence. They contend that inasmuch as the plaintiff testified he did not know which one of the defendants, Welty, Bianchini and Sizemore, hit him, there is no evidence tending to show that either Welty or Bianchini struck and injured him as he claims. The plaintiff testified that at the time he was injured one of such three defendants said "Let me have him," and another said "Let me have him;" that thereupon all three defendants entered the cell and some one hit him and he was knocked unconscious. Before that time the plaintiff bore no evidence of injury. When examined by a doctor shortly thereafter, besides a fractured jaw bone, he had bruises and abrasions on the side of his face and on his head. Welty and Bianchini admitted they were in the cell at the time the plaintiff testified he was assaulted, that they both had their hands on him, and that Bianchini had a piece of hose in his hands. Every person who joins in committing a tort is severally liable for it. (Tandrup v. Sampsell, 234 Ill. 526; Olsen v. Upsahl, 69 Ill. 273.) Whether or not the present defendants began the assault, whether or not they used more force than was reasonably necessary, assuming the plaintiff was the first aggressor, and whether or not they unlawfully assaulted and beat the plaintiff, were all pure questions of fact for a jury. Evidently the jury, as they had a right to do, believed the testimony favorable to the plaintiff. A court of review will not reverse the judgment of the trial court where the evidence of the successful party, when considered by itself, is clearly sufficient to sustain the verdict. (Calvert v. Carpenter, 96 Ill. 63; Shevalier v. Seager, 121 Ill. 564.) We can not say that the verdict is contrary to the manifest weight of the evidence.

The court gave in all twenty instructions, ten at the request of the plaintiff, and ten at the request of the defend-



ants. Complaint is made of eight of the ten given at the request of the plaintiff. Several of such instructions are objected to on the ground that they stated mere abstract propositions of law. The giving of an instruction stating an abstract proposition of law is not to be commended, but is not reversible error if the instruction is based on the evidence and applicable to the case and if it correctly states the law and does not have a tendency to mislead the jury. (Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562; Hanke v. Chicago Rys. Co., 208 Ill. App. 293; Eaton v. Coal Co., 173 Ill. App. 444.) After a careful consideration of all of the instructions we believe that the jury were fully and fairly instructed as to the law applicable to the case and that there was no reversible error in the giving of instructions.

There being no reversible error the judgment of the trial court is affirmed.

Affirmed.

**FILED**

MAY 31 1941

*David J. Mallitt*

CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS



stract

General Number 9255.

Agenda number 8.

IN THE APPELLATE COURT  
OF ILLINOIS

THIRD DISTRICT

APRIL TERM, A. D. 1941

NORMAN TAYLOR, MILDRED SLAGLE,  
WAYNE BIEHL and NORMAN TAYLOR  
as Executor of the Last Will  
and Testament of Lucy Taylor,  
deceased,

Plaintiffs-Appellants,

-vs-

JESSE MORRISON,

Defendant-Appellee.

APPEAL FROM THE CIRCUIT COURT  
OF SCOTT COUNTY.

310 I.A. 671

HAYES, J.

This is an appeal from a judgment of the Circuit Court of Scott County, which Court dismissed the amended complaint and entered judgment against the plaintiffs for costs.

The amended complaint consists of two counts. The first count avers that in the disposition and settlement of a divorce suit between the defendant and his wife Ollie Morrison, it became necessary for the defendant to pay to the complainant in the divorce suit, the sum of five hundred (\$500.00) dollars; that to secure said sum the mother of the defendant negotiated a loan of five hundred (\$500.00) dollars from Lucy Taylor in Scott County, for the use and benefit of the defendant, which money was paid over to Ollie Morrison, the wife of the defendant. The second count sets up an express contract.

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On this appeal, appellant relies solely on count one, and contends that it sets up a quasi contract.

The use of the language 'negotiating a loan' necessarily implies an express contract. A loan cannot be made unless it is made by a lender who loans, and a borrower who promises to pay. According to the lexicographers, the word 'negotiate' means not only 'to transfer', 'to sell', 'to pass', but 'to procure by mutual intercourse and agreement with another.' *First National Bank of Greenville v. Sherburne*, 14 Ill. App. 566, 569. It is fundamental in the law and sound common sense, that there cannot be an express contract and an implied contract at the same time. *Noll Co. v. Sparks Milling Co.*, 304 Ill. App. 624, 628. There can be no implied contract where there is an express contract between the parties in reference to the same subject matter. 17 C.J.S. Section 5, page 321.

The natural and usual construction of the language used in count one would indicate that a loan was made by Molly Morrison from Lucy Taylor, and that Molly Morrison used this money to pay Ollie Morrison a lump sum of money for alimony. The pleading is indefinite. The meager averments in the complaint fail to show the time of the transaction or the maturity date of the loan. The averments attempt to state, in the same count, an express contract and an implied contract, which are inconsistent. Such a pleading, on being tested by a motion to strike, is insufficient in law, either as an express, implied or quasi contract.

It is a fundamental rule of pleading that a complaint, in order to stand, must contain sufficient averments to state a cause of action. *Woodworth v. Sandin*, 371 Ill. 302, 306. Our Supreme Court in *Walker v. Brown*, 28 Ill. 378, 386 stated that when work is done under a contract, the suit must be between the parties to it;

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and third persons, though benefited by the work, cannot be sued on an implied assumpsit to pay for that benefit, upon the idea that they cannot avail of the fact of the work being so done under a contract with others. From the pleading it would appear that the loan was voluntarily made by Lucy Taylor to Mrs. Molly Morrison. There is no charge of fraud, coercion or mistake.

The case of Highway Commissioners v. City of Bloomington, 253 Ill. Sup. 164, which is relied upon by appellants is not analogous to this case, for in the cited case taxes were paid to the city, under an invalid law, which should have gone to the township. Plainly that was an error which made a cause of action based on a quasi contract, but nothing of that kind appears in this complaint. The other case relied upon by appellants is Chemical National Bank v. The City Bank of Portage, 156 Ill. Sup. 149. In that case the declaration consists of common counts and is not based on an express contract. The facts in the case show a proper basis for indebitatus assumpsit in an equitable action, where the defendant had obtained money which in equity and good conscience he should not be permitted to retain. Both the pleadings and the proofs there show an entirely different situation from the cause of action set up in the complaint in this case.

It is unnecessary for us to pass on the remaining questions raised on this appeal, being the bar, by reason of the Statute of Limitations, and the misjoinder of parties, for we find that the amended complaint does not state a cause of action. Therefore the ruling and judgment of the Circuit Court is correct, and for the reasons herein indicated, we do hereby affirm it. Judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

and third persons, the same permitted to be used  
on an individual contract to pay a certain amount  
that they cannot pay it at the time of the contract  
a contract with others. The individual contract is  
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There is no other way, however, to be used.

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41567

SOPHIE CAPLAN,

Appellee.

v.

GAYTIME DRESS SHOPS, INC., a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

PRESIDING

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

3101.A.672

On August 30, 1939, plaintiff filed her statement of claim in the Municipal Court of Chicago. She alleged that plaintiff employed her as a saleslady and assistant manager at a salary of \$16.00 per week for a 48 hour week; that from July 1, 1937 to June 15, 1939 she worked 98 weeks; that plaintiff, under threat of dismissal, forced her to work an average of 5 hours each week in excess of such 48 hours, in violation of Section 1 of an act concerning the hours of employment of females in certain occupations, as amended by an act approved July 1, 1937, (Par. 5, Ch. 48, Ill. Rev. Stat. 1939). Plaintiff further alleged that "the exact information as to the hours worked by her is completely shown by the records of the defendant or in memoranda kept by defendant for its own personal records". Plaintiff sought a judgment for \$165.33. The case was tried before the court without a jury and resulted in a finding and judgment against defendant in the sum of \$193.43 and costs. This appeal followed.

Plaintiff states her theory of the case to be that the extra services rendered by her created a contract in law implied on the part of the defendant to reimburse her; and that she was neither a particeps criminis nor in pari delicto with the defendant. Plaintiff concedes that an express contract to work in excess of eight hours a day would be void. Defendant maintains that the judgment should be reversed because plaintiff was under no compulsion to work and might have resigned at any time; that there is neither a common law or statutory remedy to sustain plaintiff's claim; that the only remedy afforded by the statute is the provision for enforce-

SOPHIE CARLAN,

Appellee,

MUNICIPAL COURT

v.

DAYTIME DRESS SHOP, INC., a corporation,

Appellant.

PRESIDING

THE JUSTICE OF THE PEACE IN THE JUDICIAL DISTRICT OF THE CITY OF NEW YORK

8101 A. 672

On August 30, 1939, Plaintiff filed her statement of claim

in the Municipal Court of Chicago. She alleged that Plaintiff

employed her as a saleslady and assistant manager at a salary of

\$10.00 per week for a 48 hour week; that from July 1, 1937 to

June 15, 1939 she worked 98 weeks; that Plaintiff, under threat of

dismissal, forced her to work an average of 5 hours each week in

excess of such 48 hours, in violation of Section 1 of an act con-

cerning the hours of employment of females in certain occupations,

as amended by an act approved July 1, 1937, (Act 3, Ch. 48, Ill.

Rev. Stat. 1939). Plaintiff further alleged that "the exact in-

formation as to the hours worked by her is completely shown by the

records of the defendant or in memoranda kept by defendant for the

own personal records". Plaintiff sought a judgment for \$33.33. The

case was tried before the court without a jury and resulted in a find-

ing and judgment against defendant in the sum of \$108.43 and costs.

This appeal followed.

Plaintiff asserts her theory of the case to be that the

extra services rendered by her created a contract in law implied in

the fact of the defendant's retention of her; and that she was entitled

to a particular remedy not in any statute with the defendant.

It is contended that an express contract to work in excess of eight

hours a day would be void. Defendant maintains that the judgment

should be reversed because Plaintiff was under no obligation to

work and might have resigned at any time; that there is no

common law or statutory remedy to sustain Plaintiff's claim; that

the only remedy afforded by the statute is the provision for enforce-

ment by the Department of Labor of the penal provisions of the act for violation thereof, and that the finding of the trial court is not supported by any evidence. The trial court found that the reasonable value of plaintiff's overtime work was 33 $\frac{1}{2}$  cents an hour. Plaintiff commenced employment in January, 1937, as an extra sales clerk at defendant's store located at 2749 Milwaukee Avenue, Chicago, working part time until the week ending July 1, 1937. She was then employed on a full time basis at a salary of \$16.00 per week, except for a two months period when she was paid \$15.00 per week. Her employment continued for a period of 98 weeks and until July 17, 1939. The statute limits the working week for women to 48 hours, except for a period of 4 weeks in each year. At the time plaintiff filed her statement of claim she contemplated that she would be able to prove her case from defendant's records. These records do not show that the defendant violated the act. The records, in fact, show that the defendant complied with the provisions of the act. Plaintiff testified in her own behalf and called the manager of defendant as an adverse witness. He did not support her contentions. She introduced no other evidence. Her testimony was inconsistent and evasive. Her testimony did not make out a case. Because of this view, it is unnecessary for us to decide whether plaintiff would have a cause of action under the act entitled "An Act concerning the hours of employment of females in certain occupations", Ch. 48, Ill. Rev. Stat. 1939.

For the reasons stated, the judgment of the Municipal Court of Chicago is reversed and judgment for costs is entered here for the defendant and against plaintiff.

JUDGMENT REVERSED.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

ment by the Department of Labor of the penal provisions of the act

for violation thereof, and that the finding of the trial court is

not supported by any evidence. The trial court found that the

reasonable value of plaintiff's overtime work was 30 cents an hour.

Plaintiff commenced employment in January, 1937, as an extra sales

clerk at defendant's store located at 2743 Milwaukee Avenue, Chicago.

Working part time until the week ending July 1, 1937. She was then

employed on a full time basis at a salary of \$18.00 per week, except

for a two month period when she was paid \$15.00 per week. Her

employment continued for a period of 88 weeks and until July 14, 1938.

The statute limits the working week for women to 48 hours, except

for a period of 4 weeks in each year. At the time plaintiff filed

her statement of claim she represented that she would be able to

prove her case from defendant's records. These records do not show

that the defendant violated the act. The records, in fact, show

that the defendant complied with the provisions of the act. Plain-

tiff testified in her own behalf and called the manager of

defendant as an adverse witness. He did not support her contentions.

She introduced no other evidence. Her testimony was inconsistent

and evasive. Her testimony did not make out a case. Because of

this view, it is unnecessary for us to decide whether plaintiff

would have a cause of action under the act entitled "an act

concerning the hours of employment of females in certain occupations",

Ch. 48, Ill. Rev. Stat. 1938.

For the reasons stated, the judgment of the Municipal

Court of Chicago is reversed and judgment for costs is entered

here for the defendant and against plaintiff.

JOSEPH W. WELLS.

DEPT. OF LABOR, U. S. DEPT. OF JUSTICE, WASHINGTON, D. C.

41668

CHICAGO TRUCK LEASING COMPANY, a  
corporation,

v.

Gebhardt Chili Powder Company,  
a corporation,

APPEAL FROM

MUNICIPAL COURT  
OF CHICAGO.

PRESIDING

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Plaintiff filed its statement of claim in the Municipal Court of Chicago alleging that on November 20, 1939 defendant leased from it four motor trucks and agreed to pay therefor \$20.00 per week per truck plus five cents per mile of travel; that defendant operated the trucks from November 20, 1939 to December 14, 1939, both inclusive, during which time they traveled 3,197 miles; that the fixed rental amounted to \$293.32 and the mileage to \$159.85, or a total of \$453.17; that defendant paid on account the sum of \$311.96 and owed a balance of \$141.21, for which plaintiff asked judgment. Defendant filed a pleading called a "defence". This pleading admitted that on November 20, 1939 it leased four trucks; denied that it agreed to pay for the use thereof the sum of \$20.00 per week per truck plus five cents per mile of travel; asserted that it agreed to pay at the rate of \$20.25 per week per truck and four cents per mile of travel, excluding the first 200 miles traveled per week per truck; and as a further defense stated that there was an account stated between the parties in the amount of \$311.96, which defendant paid. The case was tried before the court without a jury and resulted in a finding and judgment for the defendant, to review which this appeal is prosecuted.

On November 24, 1939, the parties made a verbal agreement which was confirmed by a letter of the same date from plaintiff to defendant. This letter states that the trucks are leased on the basis of \$20.00 per week per truck, plus five cents per mile for the first 30 days; \$15.00 per week per truck for the second 30 days usage, plus five cents per mile, and for the third 30 day period

CHICAGO TRUCK LIND COMPANY, a corporation,  
v.  
Edward Chiff Powder Company, a corporation,  
Respondents.

PRESIDING

MR. JUSTICE BURKE delivered the opinion of the court:

Plaintiff filed its statement of claim in the Municipal Court of Chicago alleging that on November 20, 1939 defendant leased from it four motor trucks and agreed to pay therefor \$2.00 per week per truck plus five cents per mile of travel; that defendant operated the trucks from November 20, 1939 to November 14, 1939, both inclusive, during which time they traveled 8,197 miles; that the fixed rental amounted to \$63.33 and the mileage to \$52.84 or a total of \$116.17; that defendant paid on account the sum of \$11.00 and owed a balance of \$105.17, for which plaintiff asked judgment. Defendant filed a pleading called a "defence". This pleading admitted that on November 20, 1939 it leased four trucks; denied that it agreed to pay for the use thereof the sum of \$2.00 per week per truck plus five cents per mile of travel; asserted that it agreed to pay at the rate of \$2.00 per week per truck and four cents per mile of travel, excluding the first 200 miles traveled per week per truck; and further asserted that there was an account stated between the parties in the amount of \$211.00, which defendant paid. The case was tried before the court without a jury and resulted in a judgment in favor of the defendant, to wit: that the defendant should pay to the plaintiff the sum of \$116.17, which was confirmed by a letter from the plaintiff to the defendant. This letter stated that the trucks were leased on the basis of \$2.00 per week per truck, plus five cents per mile for the first 20 days; \$2.00 per week per truck, plus five cents per mile, for the next 10 days, and the sum of \$10.00 per week per truck, plus five cents per mile, for the next 10 days.



\$20.25 per week per truck for 200 miles, with overmileage charged at the rate of four cents per mile per truck. At the end of the 90 day period, should defendant enter into a yearly contract, the latter would be rebated the difference between the rate charged for the 90 day period and the contract rate of \$20.25 per week per truck for 200 miles. Either party was given the right to cancel the agreement at the end of any 30 day period by giving to the other party 30 days' written notice. On November 25, 1939, Mr. N. B. Shapiro, defendant's Chicago representative, called Mr. W. C. Makinney, plaintiff's president, on the telephone. That conversation was confirmed by a letter of the same date from plaintiff to defendant, which reads:

"Confirming our telephone conversation of this morning relative to our letter of November 24th regarding the leasing by your company of four (4) trucks commencing Monday, November 20th, it is your desire to have these trucks billed on a weekly basis of \$20.25 for 200 miles of service, with the overmileage to be billed at the rate of 4 cents per mile.

"The reason you want the billing made out on this basis is that your company has approved the deal on this basis, but they have also agreed that in case the trucks were not used for the full 90 day period you would reimburse us for the difference in the rates set out in our letter of November 24th. If we are correct in this understanding and you will confirm the same we will make the billing as you suggest, with the above understanding, that you will reimburse us with the difference between the amount billed and the rate as outlined in our letter of November 24th. In case you desire to cancel at the end of any one month you may do so providing you pay the rate for the first 30 days of service and the second 30 days of service on the basis of rates set out in our letter of November 24th."

The trucks were delivered to defendant, which used them for the period commencing Monday, November 20, 1939 and ending Thursday, December 14, 1939, or less than 30 days. Defendant drove the trucks 3,197 miles. According to the claim of plaintiff, the amount due, based on a rental of \$20.00 per week per truck plus five cents per mile of travel, is \$453.17, of which defendant paid \$311.96, leaving a balance due of \$141.21. Plaintiff rendered invoices to defendant. The first, dated November 27, 1939, covers the period from Monday, November 20, 1939 to Saturday, November 25, 1939, and is for \$81.60. This bill was paid December 2, 1939. The second invoice, dated December 4, 1939, covers the period from Monday, November 27, 1939

180.25 per week per truck for 200 miles, with overmiles charged at the rate of four cents per mile per truck. At the end of the 90 day period, should defendant enter into a yearly contract, the latter would be rebated the difference between the rate charged for the 90 day period and the contract rate of 180.25 per week per truck for 200 miles. Either party was given the right to cancel the agreement at the end of any 90 day period by giving to the other party 30 days' written notice. On November 25, 1938, Mr. H. O. Shapiro, defendant's Chicago representative, called Mr. J. O. McKinney, plaintiff's president, on the telephone. That conversation was confirmed by a letter of the same date from plaintiff to defendant, which reads:

"Confirming our telephone conversation of this morning relative to our letter of November 25th regarding the leasing by your company of four (4) trucks commencing Monday, November 20th, it is your desire to have these trucks billed on a weekly basis of 180.25 for 200 miles of service, with the overmiles to be billed at the rate of 4 cents per mile. "The reason you want the billing made out on this basis is that your company has removed the deal on this basis, but they have also agreed that in case the trucks were not used for the full 90 day period you would reimburse us for the difference in the rates set out in our letter of November 25th. If we are correct in this understanding and you will confirm the same we will make the billing as you suggest, with the above understanding, that you will reimburse us with the difference between the amount billed and the rate outlined in our letter of November 25th. In case you desire to cancel at the end of any one month you may do so providing you pay the rate for the first 90 days of service and the second 90 days of service on the basis of rates set out in our letter of November 25th."

The trucks were delivered to defendant, which used them for the period commencing Monday, November 20, 1938 and ending Monday, December 14, 1938, or less than 90 days. Defendant gave the trucks 3,197 miles. According to the claim of plaintiff, the amount due, based on a rental of \$1.00 per week per truck, plus five cents per mile of travel, is \$337.75, of which defendant will pay \$11.00, leaving a balance due of \$326.75. Plaintiff requested payment to defendant. The first, dated November 4, 1938, covers the period from Monday, November 20, 1938 to Saturday, November 25, 1938, and is for \$11.00. This bill was paid December 1, 1938. The second was dated December 4, 1938, covers the period from Monday, December 20, 1938 to Sunday, December 25, 1938, and is for \$11.00.

to Saturday, December 2, 1939, and is for \$87.80. It was paid December 6, 1939. Each of these invoices bears a notation reading: "Billed in accordance with our letter of Nov. 25th, 1939". The third invoice, dated December 11, 1939, covers the period from Monday, December 4, 1939 to Saturday, December 9, 1939, for \$83.12, and was paid December 15, 1939. The fourth invoice, dated December 18, 1939, covers the period from Monday, December 11th, 1939 to Thursday, December 14, 1939, for \$59.44, and was paid on February 29, 1940. The invoices of December 11, 1939 and December 18, 1939 do not carry the notation that they were billed in accordance with the letter of November 25, 1939. On December 21, 1939 plaintiff sent the following letter directed to defendant at its Chicago office:

"Please find enclosed your billing for week ending December 14th. You will note that you were charged on a pro-rata basis for this week the same as you have been billed in the previous week. We have revised the billing on these trucks on the basis of \$20.00 per week, plus five cents per mile, the agreed rate you would pay in accordance with our understanding outlined in our letter of November 24th when the deal was made by you to use these trucks. In accordance with this understanding you owe us a balance of \$141.21, plus \$59.44, the billing for the last four days of service."

This letter was accompanied by a revised invoice showing that defendant owed \$141.21, plus \$59.44 represented by the invoice of December 18, 1939. Mr. Shapiro, defendant's representative, was in San Antonio, Texas, and the letter was forwarded to him. He received it on December 26, 1939. He testified that on receipt of the letter he wrote to plaintiff and "protested the claim". He did not retain a copy of his reply. Plaintiff denies receipt of any reply. Mr. Shapiro further testified that at a conference in plaintiff's office, which took place after service of the summons, Mr. Blair Makinney said to him that it was "very funny that if I was disputing this claim that I had not replied to any of his communications about it until after the suit had been filed". He was asked whether he did not in that conference tell Mr. Makinney that he had written a letter from San Antonio and he replied, "I told him I had 'phoned him".

to Saturday, December 2, 1933, and is for \$27.00. It was said  
 December 6, 1933. Each of these invoices bears a notation reading:  
 "Billed in accordance with our letter of Nov. 28th, 1933." The  
 third invoice, dated December 11, 1933, covers the period from  
 Monday, December 4, 1933 to Saturday, December 9, 1933, for \$21.15,  
 and was paid December 12, 1933. The fourth invoice, dated December  
 18, 1933, covers the period from Monday, December 11th, 1933 to  
 Thursday, December 14, 1933, for \$27.44, and was paid on February  
 20, 1934. The invoices of December 11, 1933 and December 18, 1933  
 do not carry the notation that they were billed in accordance with  
 the letter of November 28, 1933. On December 31, 1933 plaintiff  
 sent the following letter directed to defendant at its Chicago office  
 "Please find enclosed your billing for week ending December  
 18th. You will note that you were charged on a pro-rata basis  
 for this week the same as you have been billed in the previous week.  
 We have revised the billing on these trucks on the basis of \$40.00  
 per week, plus five cents per mile. The agreed rate you would pay  
 in accordance with our understanding outlined in our letter of  
 November 24th when the deal was made by you to use these trucks.  
 In accordance with this understanding you owe us a balance of  
 \$141.31, plus \$27.44, the billing for the last four days of service.  
 This letter was accompanied by a revised invoice showing that  
 defendant owed \$141.31, plus \$27.44 represented by the invoice of  
 December 18, 1933. Mr. Shapiro, defendant's representative, was  
 in San Antonio, Texas, and the letter was forwarded to him. He  
 received it on December 22, 1933. He testified that on receipt of  
 the letter he wrote to plaintiff and "protested the claim". He  
 did not retain a copy of his reply. Plaintiff denies receipt of  
 any reply. Mr. Shapiro further testified that at a conference in  
 plaintiff's office, which took place after service of the summons,  
 Mr. Blair Mackinney said to him that it was "very funny that if I  
 was disputing this claim that I had not replied to any of his  
 communications about it until after the suit was filed". He  
 was asked whether he did not in that conference tell Mr. Mackinney  
 that he had written a letter from San Antonio and he replied, "I  
 told him I had 'phoned him'."

Plaintiff made out a prima facie case and rested. Thereupon defendant called Blair Makinney as its witness. During the transaction in question he was sales manager for plaintiff. He testified that three days before defendant quit using the trucks Mr. Shapiro called him on the telephone and asked him to come over to his office, and that he (Blair Makinney) went to Shapiro's office. Asked to relate the ensuing conversation, the witness replied. "He was going to lay the trucks up, he told me over the telephone, he was going to lay the trucks [up]." To the question, "What do you mean by 'lay the trucks up'?" he answered, "He was going to quit using them in another week". Although this witness stated that the conversation took place three days before defendant quit using the trucks, he later testified that the conversation took place on Wednesday, December 13, 1939. He further testified that he did not discuss the rates; that defendant was only going to use the trucks about a week longer; that when he went to defendant's office he told Shapiro "if he was going to use them only a week, I asked him if it would be all right to lay them off a week earlier because we could probably use them in the week before Christmas to someone else, which he did." Mr. Shapiro, called by defendant, testified that around December 12th or 13th he called Blair Makinney on the telephone and asked him to come to his (Shapiro's) office. He further testified that he was going to lay the trucks up between Christmas and New Year "because we do not operate our sales room during that time, and I asked if I could leave the merchandise in the trucks." He further testified that Makinney "told me that the department stores were hollering for the trucks right there and wanted to know if I could let him have those trucks any earlier than that. I told him I could let him have them at any time now, anything he asked to help him". N. B. Rhodes, a salesman for defendant testified that he was present at the conference between Blair Makinney and Shapiro on December 13, 1939; that at the time he was busy making out his reports; that the conversation was to the

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upon defendant called Blair Winney as its witness. During the  
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testified that three days before defendant quit using the trucks  
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defendant testified that he was present at the warehouse between  
Blair Winney and Shapiro on December 15, 1939; that at the time  
he was busy making out his report; that the conversation was in the

effect that "Mr. Shapiro wished to have the trucks discontinued for one week during the holidays"; that Mr. Makinney stated that was satisfactory with him, that, in fact, he would like to pull the trucks off a week sooner because he had a chance to let them to some department store in the loop, and that Mr. Shapiro told Makinney plaintiff could have the trucks the following afternoon.

Plaintiff's theory is that it is entitled to recover rental for the use of its trucks at the rate agreed upon, less the amounts paid from time to time by defendant; that the rate was a sliding one, decreasing each 30 days; that the trucks were used less than 30 days and that hence the rate specified for the first 30 days' use is applicable. Defendant does not state its theory. Plaintiff asserts that defendant's theory is that the applicable rate was less than that claimed by plaintiff and that an account had been stated in the amount of \$311.96, which was paid. The first point argued by plaintiff is that to constitute an account stated each party must understand and agree, expressly or impliedly, that the statement is a final adjustment of the account. Plaintiff also states that the rendition of an account is open to explanation by the party rendering it, of any omission or mistake, in the absence of facts creating an estoppel. Defendant maintains that where the amount is in dispute, the acceptance by a creditor of payment of the amount which the debtor claims to be the total amount due in full settlement, if accepted by the creditor is a satisfaction of the claim. Defendant in its pleading and during the trial relied on two defenses, namely, that the contract was for a lower rate than that claimed by plaintiff and that there was an account stated with payment of the agreed amount. Defendant's first point, however, urges that the acceptance by plaintiff of the amount which the defendant claimed to be the total amount due at a time when there was a bona fide dispute between the parties, constituted a satisfaction of the claim. This is the defense of accord and satisfaction. The

effect that "Mr. Shapiro wished to have the trucks discontinued for one week during the holidays"; that Mr. Makinney stated that was satisfactory with him, that, in fact, he would like to pull the trucks off a week sooner because he had a chance to let them to some department store in the loop, and that Mr. Shapiro told Makinney plaintiff would have the trucks the following afternoon.

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latter defense should not be confused with the defense asserted by defendant in its pleading, namely, "account stated". As the defendant did not try the case on the theory that it had such a defense as "accord and satisfaction", it cannot be permitted to urge that defense in this court. Nevertheless we are of the opinion (assuming that the point was made in the trial court) that defendant did not establish that there was an accord and satisfaction. We agree with plaintiff that the evidence does not show an account stated between the parties. The agreement as expressed in the letter of November 25, 1939, contemplated that plaintiff would bill the defendant "on a weekly basis of \$20.25 for 200 miles of service, with the over-mileage to be billed at the rate of four cents per mile". However, this letter also stated that the reason why defendant wanted to be billed on this basis is that defendant had approved the deal, but had also agreed that in case the trucks were not used for the full 90 day period, it would reimburse plaintiff for the difference in accordance with the rates set out in the letter of November 24, 1939. The parties are in agreement that the letter of November 25, 1939 states their understanding. At the time the invoices were sent out there is no doubt that plaintiff was following the above provisions of the letter of November 25, 1939. Accordingly, they were made out on the basis of \$20.25 per week per truck and four cents per mile of travel excluding the first 200 miles traveled per week per truck. It was clearly contemplated by the parties that if the defendant did not use the trucks for the full 90 day period plaintiff would be reimbursed in accordance with the letter of November 24, 1939. Accordingly, on December 21, 1939 plaintiff sent defendant a revised invoice for the additional amount claimed to be due. On February 29, 1940 defendant paid the fourth bill for \$59.44. On receipt of the invoices the defendant knew or should have known that the same were framed according to the provisions of the letter of November 25, 1939. The fact that each of the first two invoices bore a notation that

The fact that each of the first two invoices bore a notation that  
transferred according to the provisions of the letter of November 25, 1932,  
1940 defendant and the fourth bill for \$22.44. On receipt of the  
invoice for the additional amount claimed to be due. On February 29,  
Accordingly, on December 21, 1939 plaintiff sent defendant a revised  
reimbursement in accordance with the letter of November 25, 1932.  
not use the truck for the full 90 day period plaintiff would be  
It was clearly contemplated by the parties that if the defendant did  
travel excluding the first 900 miles traveling on each day truck,  
on the basis of \$20.00 per week per truck and four cents per mile of  
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later defense should not be confused with the defense asserted by

it was in accordance with plaintiff's letter of November 25, 1939, and that the two following invoices did not contain such a notation, does not, in our opinion, affect the situation. The defendant knew that if it did not use the trucks for the period of 90 days it would be subject to a further claim as contemplated in the agreement.

Plaintiff asserts that the amount claimed represents unpaid rent for the actual use of the trucks and that its right thereto was not forfeited by the termination of the hiring. Defendant replies that plaintiff's action in requesting and accepting the return of the trucks before the termination of the 90 day period waived that part of the agreement providing for the application of the increased rate and thereby released defendant from payment of the additional charge. No such defense is set up in the pleading filed by the defendant. However, we will consider the point. The record shows that Mr. Shapiro called Blair Makinney and requested him to come to defendant's office. Thus it appears that the defendant initiated the conversations which resulted in the trucks being turned back to the plaintiff. Blair Makinney testified that Shapiro told him on the telephone that he was going to lay the trucks up. When asked what was meant by the expression "lay the trucks up", he answered, "he was going to quit using them in another week." Defendant contends that the arrangement whereby the trucks were returned constitutes a mutual rescission and discharge of both parties by a new agreement. As stated, this defense is not raised in defendant's pleading. Assuming that it was raised, we are of the opinion that there was no rescission and discharge. When the contract was made the parties contemplated that the defendant might not use the trucks for 90 days. In case the trucks were not used 90 days the defendant knew that it would be required to pay on the basis outlined in the first letter. The fact that plaintiff was fortunate in having another prospective customer who could use the trucks, cannot defeat plaintiff's claim. The defendant had the right to the trucks and decided not to rent them after December 14,

it was in accordance with Plaintiff's letter of November 20, 1939, and that the two following invoices did not contain such a notation does not, in our opinion, affect the situation. The defendant knew that it did not use the trucks for the period of 30 days it would be subject to a further claim as contemplated in the agreement. Plaintiff asserts that the amount claimed represents unpaid rent for the actual use of the trucks and that its right thereto was not forfeited by the termination of the hiring. Defendant replies that Plaintiff's action in requesting and accepting the return of the trucks before the termination of the 30 day period waived that part of the agreement providing for the application of the increased rate and thereby released defendant from payment of the additional charge. No such defense is set up in the pleading filed by the defendant. However, we will consider the point. The record shows that Mr. Shapiro called Blair Mackinnay and requested him to come to defendant's office. Inu it appears that the defendant initiated the conversations which resulted in the trucks being turned back to the Plaintiff. Blair Mackinnay testified that Shapiro told him on the telephone that he was going to lay the trucks up. Then asked what was meant by the expression "lay the trucks up", he answered, "he was going to quit using them in another week." Defendant contends that the agreement whereby the trucks were returned constitutes a mutual rescission and discharge of both parties by a new agreement. As stated, this defense is not raised in defendant's pleading. Assuming that it was raised, we are of the opinion that there was no rescission and discharge. When the contract was made the parties contemplated that the defendant might not use the trucks for 30 days. In case the trucks were not used 30 days the defendant knew that it would be required to pay on the basis outlined in the first letter. The fact that Plaintiff was fortunate in having another prospective customer who would use the trucks, cannot defeat Plaintiff's claim. The defendant had the right to the trucks and decided not to rent them after October 1,

1939. At the time the representatives of the parties had the conversation wherein plaintiff accepted the return of the trucks there was nothing said as to the rate to be charged. Consequently, the rental basis is governed by the contract.

Defendant also contends that plaintiff as the party who is entitled to receive the benefit of that part of the agreement calling for the higher rental, waived the same by recalling the trucks, that plaintiff abandoned the agreement, and that because of such abandonment defendant was entitled to rescind the agreement, which it did. Defendant also states that the parties entered into a further agreement on January 2, 1940 for the use of three trucks. We are of the opinion that plaintiff did not waive any provision of the contract. We also find that plaintiff did not recall the trucks, nor can we agree with defendant that plaintiff abandoned the agreement. Defendant also insists that plaintiff by its acts and conduct in recalling the trucks from the defendant manifested an intention not to be bound by the agreement and thereby prevented performance by the defendant. Plaintiff did not recall the trucks and, therefore, did not prevent defendant from performing its contract. The fact that the parties entered into another contract on January 2, 1940 does not support defendant's contention that plaintiff waived the provision for compensation in case the trucks were not used for 90 days.

Our view is that the parties made an agreement, the terms of which are clear, and that under the agreement and under the issues presented to the trial court, plaintiff should have prevailed. For the reasons stated, the judgment of the Municipal Court of Chicago is reversed and a finding and judgment is entered here for the plaintiff and against the defendant in the sum of \$141.21 and costs.

JUDGMENT REVERSED AND JUDGMENT HERE.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

1939. At the time the representatives of the parties had the conversation wherein plaintiff accepted the return of the trucks there was nothing said as to the rate to be charged. Consequently, the rental basis is governed by the contract.

Defendant also contends that plaintiff as the party who is entitled to receive the benefit of that part of the agreement calling for the higher rental, waived the same by recalling the trucks, that plaintiff abandoned the agreement, and that because of such abandonment defendant was entitled to recede the agreement, which it did. Defendant also states that the parties entered into a further agreement on January 2, 1940 for the use of three trucks. We are of the opinion that plaintiff did not waive any provision of the contract. We also find that plaintiff did not recall the trucks, nor can we agree with defendant that plaintiff abandoned the agreement. Defendant also insists that plaintiff by its rate and conduct in recalling the trucks from the defendant manifested an intention not to be bound by the agreement and thereby provided performance by the defendant. Plaintiff did not recall the trucks and, therefore, did not prevent defendant from performing its contract. The fact that the parties entered into another contract on January 2, 1940 does not support defendant's contention that plaintiff waived the provision for a suspension in case the trucks were not used for 60 days. Our view is that the parties made an agreement, the terms of which are clear, and that under the agreement and under the facts presented to the trial court, plaintiff should have prevailed. For the reasons stated, the judgment of the Municipal Court of Chicago is reversed and a finding and judgment is entered here for the plaintiff and against the defendant in the sum of \$1,141.17 and costs.

JUDGMENT REVERSED AND JUDGMENT FOR PLAINTIFF.

REVEREND, J. AND SENIOR, J. J. J. J.

41833

EDWARD STANKIEWICZ and ALEX BISKUP,

Plaintiffs,

v.

PERRY E. IRVINE and CHARLOTTE IRVINE,  
et al.,

Defendants - Appellees.

INTERLOCUTORY

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

On Appeal of HEITMANN LUMBER COMPANY,  
a corporation,

Intervening Petitioner - Appellant.

810 I.A. 673

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

On August 30, 1940 the Heitmann Lumber Company, a corporation, served a sub-contractor's notice of lien on Perry E. Irvine and Charlotte Irvine, his wife, for lumber of the value of \$1,241.29, delivered to the premises owned by them, located at 4327 South Emerald Avenue, Chicago. On September 3, 1940, (four days later), the Irvines filed their suit at law in the Superior Court of Cook County against the Heitmann Lumber Company and other lien claimants. Therein they asked damages because of the alleged failure of such defendants to complete their work. The Heitmann Lumber Company filed its answer and the cause is still pending and undisposed of. On November 20, 1940 Edward Stankiewicz and Alex Biskup filed their verified complaint in the Superior Court of Cook County to foreclose mechanic's liens of \$168.08 and \$160.00 respectively against the property of the Irvines. This complaint alleged that the plaintiffs, as sub-contractors, made contracts with one C. E. Sander, the general contractor, and that plaintiffs performed under the contract and were entitled to liens. On November 30, 1940, the Heitmann Lumber Company was, by leave of court, made a party defendant in the mechanic's lien case pending in the Superior Court, and filed its verified intervening petition on the same day to foreclose its

EDWARD STANKOWICZ and ALEX BISHOP,

Plaintiffs,

v.

HENRY E. IRVINE and CHARLOTTE IRVINE,  
et al.,

Defendants - Appellees.

On Appeal of HELLMANN LUMBER COMPANY,  
a corporation,

Intervening Petitioner - Appellant.

3101A.678

STATE OF ILLINOIS

COUNTY OF COOK

COURT OF COMMON PLEAS

IN AND FOR THE COUNTY OF COOK

MR. PRESIDING JUSTICE BURNS DELIVERED THE OPINION OF THE COURT:

On August 20, 1940 the Hellmann Lumber Company, a corporation,

served a sub-contractor's notice of lien on Henry E. Irvine

and Charlotte Irvine, his wife, for lumber of the value of \$1,411.78,

delivered to the premises owned by them, located at 2327 South

Marshall Avenue, Chicago. On September 3, 1940, (four days later),

the Irvines filed their suit at law in the Superior Court of Cook

County against the Hellmann Lumber Company and other lien claimants.

Therein they asked damages because of the alleged failure of such

defendants to complete their work. The Hellmann Lumber Company

filed its answer and the cause is still pending and undisposed of.

On November 20, 1940 Edward Stankowicz and Alex Bishop filed their

verified complaint in the Superior Court of Cook County to foreclose

mechanic's liens of \$168.08 and \$100.00 respectively against the

property of the Irvines. This court has issued writs of prohibition,

as sub-contractors, have contracts, and as such, are

general contractors, and as such, are entitled to foreclose

and were entitled to liens. On November 1, 1940, the Hellmann

Lumber Company was, by leave of court, made a party defendant in

the mechanic's lien case pending in the Superior Court. On May

its verified intervening petition on the basis of foreclosing its



lien claim in the sum of \$1,241.29. The petition set out that the intervenor was a sub-contractor, having a contract with one Mike Janisch, a carpenter contractor, who in turn had a contract with G. E. Bander, the general contractor, to furnish and deliver lumber to the property of the Irvines, and that the last delivery occurred on August 12, 1940. On April 18, 1941 the Irvines filed their petition in the mechanic's lien suit, praying that the intervening petition of the Heitmann Lumber Company be dismissed and that said corporation be restrained from prosecuting its claim for lien. The Irvines therein asserted that the Heitmann Lumber Company had an adequate remedy at law. On May 8, 1941 the matter was heard on the intervening petition and the answer and the court dismissed such intervening petition and enjoined the Heitmann Lumber Company from proceeding further in the lien suit. On May 12, 1941 the Heitmann Lumber Company presented its petition to vacate the order of May 8, 1941. On that day (May 12, 1941) the court vacated that part of the order of May 8, 1941 which dismissed the intervening petition. The court, however, decreed that the "Heitmann Lumber Company be enjoined and restrained from further prosecuting its intervening petition herein until the further order of the court". To reverse such interlocutory order so restraining the prosecution of the intervening petition, the Heitmann Lumber Company prosecutes this appeal.

The first point advanced by appellant is that a proceeding under the mechanic's lien statute is cumulative. The law is well settled that a lienor may pursue several remedies at the same time for the satisfaction of his claim so long as there is only one satisfaction. In many cases it is necessary for a lienor to resort to several remedies in order to obtain full satisfaction and the pursuit of one or all of them cannot be construed as a waiver of any rights of the lienor so long as there is one satisfaction. West v. Flenning, 18 Ill. 248; Templeton v. Horne, 82 Ill. 491; Erikson v.

lien claim in the sum of \$1,241.29. The petition set out that the intervenor was a sub-contractor, having a contract with one Mike Janasch, a carpenter contractor, who in turn had a contract with O. E. Bander, the general contractor, to furnish and deliver lumber to the property of the Irvines, and that the last delivery occurred on August 12, 1940. On April 12, 1941 the Irvines filed their petition in the mechanic's lien suit, praying that the intervening petition of the Helmann Lumber Company be dismissed and that said corporation be restrained from prosecuting its claim for lien. The Irvines therein asserted that the Helmann Lumber Company had an adequate remedy at law. On May 8, 1941 the matter was heard on the intervening petition and the answer and the court dismissed such intervening petition and enjoined the Helmann Lumber Company from proceeding further in the lien suit. On May 12, 1941 the Helmann Lumber Company presented its petition to vacate the order of May 8, 1941. On that day (May 12, 1941) the court vacated that part of the order of May 8, 1941 which dismissed the intervening petition. The court, however, decreed that the Helmann Lumber Company be enjoined and restrained from further prosecuting its intervening petition until the further order of the court. To reverse such interlocutory order so restraining the prosecution of the intervening petition, the Helmann Lumber Company procured this report.

The report was advanced by respondent to the court proceeding under the mechanic's lien statute is quashed. The fact is well settled that a litigant may remove a cause of action at the same time for the satisfaction of his claim so long as there is only one satisfaction. In many cases it is necessary for a litigant to resort to several remedies in order to obtain full satisfaction and the pursuit of one or all of them cannot be considered a violation of any rights of the lienee so long as there is no double recovery. v. Fleissman, 18 Ill. 2d 445; Janasch v. Bander, 32 Ill. 2d 441; Wright v.

Ward, 266 Ill. 259; Olson v. O'Malia, 75 Ill. App. 387; Rockwood Sprinkler Co. v. Phillips Co., 265 Ill. App. 267. The only proceeding to enforce the mechanic's lien asserted by the Heitmann Lumber Company is the intervening petition, prosecution of which is restrained. The Irvines (appellees) filed their appearance in this court but did not file any brief. It is interesting to note that although Section 9 of the act in relation to injunctions (Par. 9, Ch. 69, Ill. Rev. Stat. 1939) requires that before a temporary injunction shall issue, the movant shall give bond, no bond was required, nor was the giving of a bond excused. The order directing the issuance of the injunction was improvidently entered. Therefore, that part of the order of the Superior Court of Cook County entered May 12, 1941, which restrains the Heitmann Lumber Company, a corporation, from further prosecuting its intervening petition, is reversed.

ORDER REVERSED.

HEBEL AND DENIS E. SULLIVAN, JJ. CONCUR.







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